Supreme Court, U.S.
FILED

96 386 SEP 9 1996

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DAVID R. HABERBUSH,

PETITIONER,

VS.

CLARK OIL TRADING COMPANY;
NIC, INC.; GIC, INC.; PAUL A. NOVELLY;
LAWRENCE ALTMANSBERGER;
AND SAMUEL R. GOLDSTEIN,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Steven J. Lee
Counsel of Record
Law Offices of Steven J. Lee
P.O. Box 263
Placentia, CA 92871
714.996.0123
Attorneys for Petitioner

80 pp

QUESTIONS PRESENTED FOR REVIEW

Creditors seek to recover $48 million pumped out of an Arizona oil company to insiders prior to bankruptcy. The statute of limitation in 11 U.S.C. § 546(a) provided that a chapter 7 bankruptcy trustee has two years after the appointment of the permanent trustee under 11 U.S.C. § 702 to commence avoidance actions. The Ninth Circuit held that the two-year period commenced when the debtor filed the bankruptcy petition, giving Haberbush only sixteen months to commence the avoidance actions.

Petitioner asks this Court to determine:

Whether the statute of limitation in 11 U.S.C. § 546(a) for a trustee to commence avoidance actions expires two years after the appointment of the permanent trustee under 11 U.S.C. § 702.

QUESTIONS *NOT* PRESENTED FOR REVIEW

Several courts of appeals have held the statute of limitation in 11 U.S.C. § 546(a) applies to debtors in possession because 11 U.S.C § 1107 states a debtor in possession is subject to any limitations on a trustee. In this petition, this Court is *not* asked to determine whether the limitation period in § 546 applies to debtors in possession.

When a trustee under one chapter replaces a trustee under another chapter, courts have split whether the new or second trustee receives a new or second two-year period under 11 U.S.C. § 546 to commence avoidance actions. This Court is *not* asked to determine if the appointment of a second trustee gives that trustee a new two-year period to commence avoidance actions.

PARTIES TO THE PROCEEDINGS PURSUANT TO RULES 14.1(b) AND 29.6

David R. Haberbush is an individual who has been appointed trustee for hundreds of bankruptcy cases. None of the entities for which Mr. Haberbush has been the trustee is related to Sahuaro Petroleum and Asphalt Company or any of the Defendants below.

Sahuaro Petroleum and Asphalt Company was a wholly-owned subsidiary of Edgington Oil Company. On March 12, 1991, Edgington Oil filed a chapter 11 petition but the case was later converted to a chapter 7 case and the shares of Edgington were sold.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

QUESTION *NOT* PRESENTED FOR REVIEW .. ii

PARTIES TO THE PROCEEDINGS PURSUANT TO RULES 14.1(b) AND 29.6 iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI 1

CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW 1

JURISDICTION 1

STATUTE INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 3

REASONS TO GRANT THIS WRIT 7

A. *The Decision below Is in Conflict with Decisions in Four Circuits.* 7

TABLE OF CONTENTS (CONTINUED)

Page

1. *The First Proposition of the IRFM Syllogism Is that a DIP Is the Functional Equivalent of an Appointed Trustee and the DIP Filing the Petition Starts the Two-Year Period in Section 546 Running.* 12

2. *The Second Proposition of the IRFM Syllogism Is that a Subsequent Trustee Does Not Restart the Two-Year Period.* 13

B. *The Decision below Is a Departure from this Court's Rules of Statutory Construction and from the Plain Meaning of Section 546 so as To Call for an Exercise of this Court's Supervisory Powers.* 18

C. *A Decision in this Case Is Important to the Thousands of Pending Cases that Were Filed before the Amendment to Section 546.* 19

D. *The Decision below Will Have a Negative Impact on the Amended Statute.* 20

CONCLUSION 22

TABLE OF CONTENTS (CONTINUED)

Page

APPENDICES 23

APPENDIX A 24
MEMORANDUM OPINION OF NINTH CIRCUIT

APPENDIX B 27
ORDER OF NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR HEARING EN BANC

APPENDIX C 28
ORDER REVERSING THE ORDER OF THE UNITED STATES BANKRUPTCY COURT [ETC.]

APPENDIX D 38
ORDER DENYING MOTION OF DEFENDANTS TO DISMISS

APPENDIX E 40
AMENDED COMPLAINT [ETC.]

TABLE OF AUTHORITIES

CASES

Supreme Court Cases

Kugler v. Helfant, 421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975) 3

Circuit Court Cases

Ford v. Union Bank (In re San Joaquin Roast Beef), 7 F.3d 1413 (9th Cir. 1993) 5-7, 10, 11, 13

Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar, 69 F.3d 799, 801 (7th Cir. 1995) 7, 9, 13

Haberbush v. Clark Oil Trading Company (In re Sahuaro Petroleum & Asphalt Co.), 1996 U.S. App. Lexis 11047 (9th Cir. 1996). 5

In re Coastal Group, Inc. 13 F.3d 81 (3d Cir. 1993) .. 12

Jobin v. Boryla (In re M&L Business Machine Co., Inc., 75 F.3d 586 (10th Cir. 1996) 7, 17

John Mitchell, Inc. v. Steinbrugge (In re Hanna), 72 F.3d 114 (9th Cir. 1996) 5-7, 16, 18

Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.) ("*Maxway*"), 27 F.3d 980 (4th Cir. 1994) 7, 8, 18

TABLE OF AUTHORITIES (CONTINUED)

Page

McCuskey v. Central Trailer Services, Ltd., 37 F.3d 1329 (8th Cir. 1994) *rehrg. denied* 7, 10

Mosier v. Kroger Co. (In re IRFM, Inc.), 65 F.3d 778 (9th Cir. 1995) (as amended) 5, 6, 11

Starzynski v. Sequoia Forest Industries, 72 F.3d 816 (10th Cir. 1995) 10

U.S. Brass & Copper Co. v. Caplan (In re Century Brass Products, Inc.), 22 F.3d 37 (2d Cir. 1994) 12

Upgrade Corp. v. Government Tech. Servs. (In re Softwaire Centre Int'l), 994 F.2d 682 (9th Cir. 1993) (per curiam) (as amended) 5, 11, 12

Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990) 12

District Court Cases

Clark Oil and Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.), 170 B.R. 689 (C.D. CA 1994) 1, 4, 20

England v. Nestle Food Co. (In re California Canners and Growers), 172 B.R. 941 (N.D. CA 1994) 14

Jobin v. Boryla (In re M & L Business Machine Co., Inc.), 171 B.R. 383 (D. CO 1994) 16

TABLE OF AUTHORITIES (CONTINUED)

Page

McCullough v. Kenneth Leventhal & Co. (In re Emergency Networks, Inc.), 188 B.R. 227 (N.D. TX 1995) 16

Bankruptcy Appellate Panel Cases

Kroh v. T.R.M. Mfg. (In re Conco Bldg. Supplies, Inc.), 102 B.R. 190 (Bankr. 9th Cir. 1989) 8, 20

Bankruptcy Court Cases

Grabscheid v. Knox Metals Corp. (In re Luria Steel and Trading Corp.), 168 B.R. 913 (Bankr. N.D. IL 1994) 14

Iron-Oak Supply Corp. v. Nibco, Inc. (In re Iron-Oak Supply Corp.), 162 B.R. 301 (Bankr. E.D. CA 1993) (en banc) 14

Liebersohn v. Rental/Tools Equip. (In re Nelson Co.), 167 B.R. 1018 (Bankr. E.D. PA 1994) 14

Mazze v. Wilmington Savings Fund Society (In re: Austin Truck Rental, Inc.), 177 Bankr. 827 (Bankr. E.D. PA 1995) 16

TABLE OF AUTHORITIES (CONTINUED)

Page

Federal Statutes

11 U.S.C. § 103(a) ii

11 U.S.C.A. § 301 (West 1993) 8

11 U.S.C. §546(a) (Bender, Amended, October 22, 1994) 2, 4

11 U.S.C. §546(a) (West, 1996) 21

11 U.S.C. § 1107(a) 12

11 U.S.C. 1123(b)(3) 9

28 U.S.C. § 157 4

28 U.S.C. § 1334 ..... 3, 4

Public Law 103-394, October 22, 1994 19

Federal Rules

Fed. R. Bankr. P. 7001(1) 4

Fed. R. Civ. P. 12(b)(6) 3

PETITION FOR WRIT OF CERTIORARI

Petitioner, David R. Haberbush ("Haberbush"), the duly appointed chapter 7 trustee of Sahuaro Petroleum and Asphalt Company ("Sahuaro"), respectfully petitions this Court to issue a *Writ of Certiorari* to the United States Court of Appeal for the Ninth Circuit in the case of *Haberbush v. Clark Oil Trading Company (In re Sahuaro Petroleum & Asphalt Co.)*, Ninth Circuit Case No. 94-56341 (April 29, 1996) and shows the following:

CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

The decision of the Ninth Circuit was not reported officially but is reported unofficially at 1996 U.S. App. Lexis 11047 (9th Cir. April 29, 1996). The decision is set out in Appendix A. The Order of the Ninth Circuit dated June 10, 1996, in which the petition for rehearing was denied and the suggestion for rehearing en banc was rejected, was not reported but is set out in Appendix B. The opinion of the district court is reported officially at *Clark Oil and Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.)*, 170 B.R. 689 (C.D. CA 1994) and is set out in Appendix C. The bankruptcy court Order Denying the Motion to Dismiss of defendants is not reported but is set out in Appendix D.

JURISDICTION

The date of entry of the judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is April 29, 1996. The date of the order of the Ninth Circuit denying the petition of Haberbush for rehearing and rejecting the suggestion for hearing en banc was June 10, 1996. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by *writ of certiorari* is 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

Section 546 of the Bankruptcy Code provided at the time of the filing of this bankruptcy case that:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a) (Bender, Amended October 22, 1994).[1]

---

[1] All statutory references unless otherwise noted are to title 11, United States Code, which is divided into chapters that specify the types of relief available to a debtor. *See* § 103(a). Actions or proceedings under section 544, 545, 547, 548, or 553 of the Bankruptcy Code shall be referred to as "Avoidance Actions."

STATEMENT OF THE CASE

Sahuaro Petroleum & Asphalt Company ("Sahuaro") filed a petition for relief under title 11, chapter 11, United States Code, on March 21, 1991 in the United States Bankruptcy Court for the Central District of California. Jurisdiction for the filing of the petition was based on 28 U.S.C. § 1334.

There was no trustee appointed in Sahuaro's chapter 11 case. On September 5, 1991 the bankruptcy court converted Sahuaro's bankruptcy case to one under Chapter 7 of the Bankruptcy Code. Amended Complaint, ¶ 4. [2/] (The Amended Complaint is reproduced at Appendix E.) The United States Trustee appointed Haberbush as *interim* trustee under § 701 on September 9, 1991. *See* opinion of district court at Appendix C, note 1. On November 6, 1991, the meeting of creditors required by § 341(a) was held. Creditors did not elect a trustee at the meeting so Haberbush as *interim* trustee became *the trustee* under § 702(d) on November 6, 1991. Amended Complaint, ¶ 4.

On November 4, 1993, Haberbush commenced the adversary proceeding against Clark Oil and Trading

---

[2] The Clark Defendants moved to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). Under Rule 12, factual allegations in the complaint are to be taken as true. *Kugler v. Helfant*, 421 U.S. 117, 126 n. 5, 95 S.Ct. 1524, 1531 n. 5, 44 L.Ed.2d 15 (1975).

Company ("Clark"); NIC, Inc., and GIC, Inc., the general partners of Clark; Paul A. Novelly ("Novelly"); Lawrence Altmansberger ("Altmansberger"); and Samuel R. Goldstein ("Goldstein") (referred to collectively as the "Clark Defendants").[3] Appendix C.

Bankruptcy Code § 546(a) specifies that the statute of limitation expires "two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202. . . ." Haberbush became the trustee under § 702 on November 6, 1991. There was no prior trustee appointed. Haberbush commenced suit November 4, 1993, within two years of his appointment under § 702.

The district court held the statute of limitation in § 546(a) commenced when Sahuaro filed its bankruptcy petition and expired sixteen months after Haberbush was appointed trustee under § 702. *Clark Oil v. Haberbush*, 170 B.R. at 691-92. Alternatively, the district court held the statute of limitation commenced after the United States Trustee appointed Haberbush *interim* trustee under § 701, 22 months after Haberbush was appointed trustee under § 702. *Id.* at 693.

---

[3] The complaint commenced an adversary proceeding ("Adversary Proceeding"), as defined in Fed. R. Bankr. P. 7001(1). Jurisdiction over the Adversary Proceeding was based upon 28 U.S.C. § 1334(b) in that it was a civil proceeding arising under and in the Sahuaro bankruptcy case. The Bankruptcy Court had jurisdiction of the Adversary Proceeding based upon 28 U.S.C. § 157.

The Ninth Circuit affirmed the district court. The Court of Appeals cited four cases in its affirmance of the district court:

> Trustee's first argument on appeal is that the district court erred by concluding that the limitations period of 11 U.S.C. § 546(a) (1) began to run on the date Debtor filed its Chapter 11 petition rather than when Trustee was appointed. This issue has been foreclosed by recent Ninth Circuit case law. *See John Mitchell, Inc. v. Steinbrugge (In re Hanna)*, 72 F.3d 114, 117 (9th Cir. 1996); *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778, 780-81 (9th Cir. 1995) (as amended); *Ford v. Union Bank (In re San Joaquin Roast Beef)*, 7 F.3d 1413, 1415-16 (9th Cir. 1993); *Upgrade Corp. v. Government Tech. Servs. (In re Softwaire Centre Int'l)*, 994 F.2d 682, 683-84 (9th Cir. 1993) (per curiam) (as amended).

Haberbush v. Clark Oil Trading Company (In re Sahuaro Petroleum & Asphalt Co.), 1996 U.S. App. Lexis 11047 at *2 (9th Cir. 1996).

In *Upgrade Corp. v. Government Technology Services, Inc. (In re Softwaire Centre International, Inc.)*, 994 F.2d 682, 684 (9th Cir. 1993) amended (hereafter "*Softwaire*"), a *debtor in possession* ("DIP") administered the estate; no *trustee* was ever appointed. So *Softwaire* does not even apply to the facts of *Sahuaro*.

In both *Ford v. Union Bank (In re San Joaquin Roast Beef)*, 7 F.3d 1413 (9th Cir. Oct. 20, 1993) (hereafter "*San Joaquin*") and *John Mitchell, Inc. v. Steinbrugge (In re Hanna)*, 72 F.3d 114 (9th Cir. 1995) (hereafter "*Hanna*"), a DIP was replaced by a chapter 11 trustee appointed under § 1104. Both courts held the limitations period began *not* when the debtor filed the petition, but after appointment of the *first trustee*.

The only authority contrary to Petitioner is *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778 (9th Cir. November 27, 1995) as amended (hereafter "*IRFM*"). *Sahuaro* relied on the syllogism of *IRFM* rather than the plain language of § 546. *IRFM* barred a chapter 7 trustee from commencing Avoidance Actions brought *within two years of the appointment of the first trustee*, a chapter 7 trustee, but more than two years *after the debtor filed the petition*. The decision in *IRFM*, which the court of appeals followed in *Sahuaro*, reaches a result directly contrary to the plain language of § 546(a).

REASONS TO GRANT THIS WRIT

The decision below creates a conflict with other circuits. The decision is such a departure from rules of statutory construction which this Court established and from the plain language of § 546(a) so as to call for an exercise of this Court's supervisory powers. A decision in this case is important since there are approximately 90,000 chapter 11 and chapter 7 cases still pending that the pre-amended § 546 governs. Finally, the decision will impact application of the amended version of the statute. For these reasons, Petitioner prays this Court will issue its *writ of certiorari* and accept jurisdiction of this matter.

A. *The Decision below Is in Conflict with Decisions in Four Circuits.*

Sahuaro held that the statute of limitation in § 546(a) begins to run in a chapter 11 case when the debtor files its petition. The decision in *Sahuaro* below directly conflicts with *Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)* ("*Maxway*"), 27 F.3d 980, 984 (4th Cir. 1994); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799, 801 (7th Cir. 1995); *McCuskey v. Central Trailer Services, Ltd.*, 37 F.3d 1329, 1332 (8th Cir. 1994) *rehrg. denied*; *Ford v. Union Bank (In re San Joaquin Roast Beef)*, 7 F.3d 1413 (9th Cir. Oct. 20, 1993); *John Mitchell, Inc. v. Steinbrugge (In re Hanna)*, 72 F.3d 114 (9th Cir. 1995); *Jobin v. Boryla (In re M&L Business Machine Co., Inc.*, 75 F.3d 586 (10th Cir. 1996) ("*M&L Business*").

In *Maxway*, the court was asked whether the statute of limitation in § 546(a) applied to DIPs. The court explained why it did not apply § 546 to DIPs:

> [O]ur conclusion that the statute of limitations contained in § 546(a)(1) does not begin to run upon the "appointment" of a debtor in possession is consistent with the congressional decision that the statute of limitations should not begin to run upon the appointment of some types of trustees. For example, when a debtor files a voluntary petition for relief under Chapter 7, the United States trustee appoints an interim trustee pursuant to 11 U.S.C.A. § 701. . . . Yet, *the two-year limitations period for filing an avoidance action does not begin to run until a permanent trustee is selected pursuant to 11 U.S.C.A. § 702* (West 1993). *See* 11 U.S.C.A. s 546(a)(1); *see also Kroh v. T.R.M. Mfg. (In re Conco Bldg. Supplies, Inc.)*, 102 B.R. 190 (9th Cir. BAP 1989).

Maxway, 27 F.3d at 984 (emphasis supplied).

Sahuaro held that § 546(a)(1) began to run when Sahuaro filed its petition or when Haberbush was appointed *interim* trustee, not when the permanent trustee was appointed under § 702, as *Maxway* explained § 546 requires.

In *Gleischman Sumner*, the debtor filed for bankruptcy in 1989. The court confirmed a plan of reorganization in 1990. Pursuant to the plan, Gleischman Sumner was appointed an "estate representative" under 11 U.S.C. § 1123(b)(3)(B) to wind up the business in an orderly fashion. The court of appeals acknowledged that "Gleischman Sumner is not a 'trustee' within the meaning of the Bankruptcy Code and should be treated like a debtor in possession. . . ." *Gleischman Sumner*, 69 F.3d at 800. Gleischman Sumner did not commence an adversary proceeding against the defendant until January 1994.

The court was asked whether an estate representative "appointed" under § 1123(b)(3)(B) started the two-year limitations period in § 546(a). The court

> conclude[d] that the literal reading is superior, and that the statute of limitations in § 546(a)(1) applies to trustees *exclusively*."

Gleischman Sumner, 69 F.3d at 800 (emphasis supplied).

In a case with similar facts, the Tenth Circuit concluded that

> an estate representative appointed under 11 U.S.C. [§] 1123(b)(3) is not a trustee within the meaning of 546(a) *whose appointment would commence the running of the two-year statute of limitations* in which to file adversary proceedings.

Starzynski v. Sequoia Forest Industries, 72 F.3d 816, 818 (10th Cir. 1995) (emphasis supplied).

Both the Seventh and Tenth Circuits agree the statute of limitation in § 546 did not begin to run since *no trustee* was ever appointed.

In *McCuskey*, a DIP administered the estate until the court appointed a chapter 11 trustee. Finally, the case was converted and a permanent chapter 7 trustee was appointed. The court agreed with *San Joaquin*

> that a 'plain reading of section 546(a) is that the two-year statute of limitations begins running from the date *the first trustee is appointed* and that all subsequent trustees are subject to the same two-year statute of limitations.'

McCuskey, 37 F.3d at 1332 (emphasis supplied) *quoting San Joaquin*, 7 F.3d at 1416.

In *San Joaquin*, a trustee was appointed in the chapter 11 case. The case was converted and a chapter 7 trustee was appointed. *San Joaquin* did not start the statute running when the debtor filed its petition, which would have been an easier and more straight-forward analysis. Instead, *San Joaquin* held § 546 commenced when the first trustee was appointed. *San Joaquin*, 7 F.3d at 1415-16.

In *Hanna*, a DIP operated a chapter 11 case for three days before a trustee was appointed in the chapter 11 case. The trustee commenced suit two years and two days after the petition date, but one year and 364 days after the appointment of the first trustee. The defendant moved to dismiss, relying on the syllogism of *IRFM*.

The *IRFM* Court explained its syllogism of both *Softwaire* and *San Joaquin*:

> *Softwaire Centre* stands for the proposition that a Chapter 11 debtor-in-possession is the 'functional equivalent of an appointed trustee,' 994 F.2d at 684, and that the statute of limitation starts running from the date of the Chapter 11 petition. And, *San Joaquin Roast Beef* stands for the proposition that the statute of limitations does not start anew when there is a conversion to a Chapter 7 bankruptcy. Adding these two cases together, the statute of limitations in this case began to running on . . . the date IRFM filed its Chapter 11 bankruptcy petition.

IRFM, 65 F.3d at 781.

1. *The First Proposition of the IRFM Syllogism Is that a DIP Is the Functional Equivalent of an Appointed Trustee and the DIP Filing the Petition Starts the Two-Year Period in Section 546 Running.*

In 1990, the Tenth Circuit reasoned that a DIP is the "*functional equivalent* of an appointed trustee" and is subject to any limitations on a trustee.[4] The court held the two-year limit to commence Avoidance Actions was such a limitation and so a DIP had two years to commence Avoidance Actions, just as an appointed trustee. The court held the two-year period for a DIP starts when the bankruptcy petition is filed. *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523-24 (10th Cir. 1990). In 1993, the Ninth Circuit followed *Zilkha*. *See Softwaire*, 994 F.2d at 684. Two other circuits have reached the same conclusion. *U.S. Brass & Copper Co. v. Caplan (In re Century Brass Products, Inc.)*, 22 F.3d 37 (2d Cir. 1994) ("*Century Brass*") and *In re Coastal Group, Inc.* 13 F.3d 81 (3d Cir. 1993).

Two circuits have reached the opposite result, holding that the limitation period in § 546 applies only to

---

[4] Section § 1107 provides:

> *Subject to any limitations on a trustee* serving in a case under this chapter, . . . a debtor in possession shall have all the rights . . . and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.
> 11 U.S.C. § 1107(a) (emphasis supplied).

certain types of trustees enumerated in § 546(a). *See Maxway*, 27 F.3d 980; and *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995) ("*Gleischman*").[5]

2. *The Second Proposition of the IRFM Syllogism Is that a Subsequent Trustee Does Not Restart the Two-Year Period.*

In *San Joaquin*, the court appointed a chapter 11 trustee. Then the case was converted and a chapter 7 trustee was appointed. The issue was whether the chapter 7 trustee received a new two-year statute of limitation after his appointment. The court held:

> A plain reading of section 546(a) is that the two-year statute of limitations begins running from the date the first trustee is appointed and that *all subsequent trustees* are subject to the *same* two-year statute of limitations.

San Joaquin, 7 F.3d at 1416 (emphasis supplied).[6]

---

[5] Petitioner does not ask this Court to resolve this conflict among the six circuits regarding whether § 546(a) applies to a DIP. But these cases are relevant to the conflict regarding when the statute of limitation begins for a chapter 7 trustee.

[6] Courts have split on the issue whether a second trustee receives a new two-year period to commence Avoidance Actions. Petitioner does not ask this Court to resolve this issue.

Softwaire held the DIP is the *functional equivalent* of a trustee. *IRFM* makes the DIP the *actual* equivalent since *IRFM* starts the *trustee's* statute running upon the "appointment" of the DIP rather than the trustee. *IRFM* held "*the* statute of limitation starts running from the date of the Chapter 11 petition." *The* statute of limitation for a *DIP* arises from § 1107(a) and commences *when the petition is filed*. *The* statute of limitation for an *appointed trustee* is § 546(a) is § 546 and commences after *the trustee is appointed* under section "702, or 1104, or 1163, or 1302, or 1202. . . ." *not § 1107.*[7]

Therefore, the statute of limitation that bars a trustee cannot expire, or even begin to run, before a trustee is appointed. The holding in *IRFM* cannot be reconciled with the plain meaning of § 546(a).

The court in *Hanna* criticized the *IRFM* syllogism, attributing authorship to the defendant:

---

[7] *Iron-Oak Supply Corp. v. Nibco, Inc. (In re Iron-Oak Supply Corp.)*, 162 B.R. 301, 306 (Bankr. E.D. CA 1993) (en banc) ("upshot of [*San Joaquin* and *Softwaire*] is there are two distinct two-year limitation periods); *England v. Nestle Food Co. (In re California Canners and Growers)*, 172 B.R. 941, 944 (N.D. CA 1994); *Grabscheid v. Knox Metals Corp. (In re Luria Steel and Trading Corp.)*, 168 B.R. 913, 916 (Bankr. N.D. IL 1994) ("fact that the limitations period [sic] arise from different sections supports the conclusion that they are independent of each other); *Liebersohn v. Rental/Tools Equip. (In re Nelson Co.)*, 167 B.R. 1018, 1023 (Bankr. E.D. PA 1994) ("two distinct limitations period[s]").

[Defendant] would have us apply *IRFM* to this case and hold that the limitations period began when the Chapter 11 petition was filed. He argues that because a debtor in possession is the 'functional equivalent' of a trustee under *Softwaire Centre* and that because the limitations period begins upon appointment of the first trustee under *San Joaquin Roast Beef*, [plaintiff's] limitations period must begin when the petition was filed, *which is when the debtor in possession was 'appointed.'*

[Defendant's] interpretation of our three cases *completely obliterates the plain language of section 546*. The statute *explicitly requires* the limitations period to commence 'two years after the appointment of a trustee under section [1104].' § 546(a). [Plaintiff] is an appointed Chapter 11 trustee and should have two full years in which to file an action. A debtor in possession, on the other hand, *is not an appointed trustee. See* § 1104 (a trustee is appointed to replace a debtor in possession); *Softwaire Centre*, 994 F.2d at 683 (acknowledging that a trustee was never appointed). If, as [Defendant] argues, the debtor in possession is always the first trustee, then in all Chapter 11 cases, the relevant triggering event would be the date on which the debtor filed the bankruptcy petition. The date on which a Chapter 11 trustee is actually appointed *would be*

> *completely irrelevant* when calculating the expiration of the limitations period. [This] *interpretation of our three cases reads the 'appointment of a trustee' language out of the statute.*

Hanna, 72 F.3d at 116-17 (emphasis supplied).[8]

Another evidence of conflict at the circuit level is *M&L Business Machine*, which has a convoluted fact pattern:

> Debtor . . . filed for Chapter 7 bankruptcy relief on October 1, 1990. Soon thereafter, [the case was] converted . . . to a Chapter 11 reorganization proceeding. . . . ["On December 18, 1990, Christine J. Jobin was appointed the Chapter 11 trustee. . . " *Jobin v. Boryla (In re M & L Business Machine Co., Inc.)*, 171 B.R. 383, 384 (D. CO 1994).] On September 26, 1991, however, the case was converted back to a Chapter 7 liquidation proceeding and, on October 1,

---

[8] *See also McCullough v. Kenneth Leventhal & Co. (In re Emergency Networks, Inc.)*, 188 B.R. 227, 231 (N.D. TX 1995) (court "declines to adopt the reasoning of . . . *IRFM* . . . because it creates a limitations period that, under all circumstances, runs from the time the bankruptcy petition is filed"); and *Mazze v. Wilmington Savings Fund Society (In re Austin Truck Rental, Inc.)*, 177 Bankr. 827, 833 (Bankr. E.D. PA 1995) (*IRFM* "court's logic appears to be flawed . . . [because its cite to the] *San Joaquin Roast Beef* case . . . not only appears factually deficient, the proposition misstates the holding of the case").

> 1991, Ms. Jobin was appointed the Chapter 7 trustee.

M& L Business Machine, 75 F.3d at 589 (note omitted).

Jobin amended an existing suit to add a new party on September 24, 1993. *Id.* at 589. The Tenth Circuit held that Jobin's Avoidance Action was barred because the limitation period started running after the first trustee was appointed, not when the subsequent trustee took office. The court also held that the

> limitations period [of § 546] begins to run "after the earlier of" either the appointment of a trustee or the time the case is closed or dismissed. *Once a trustee is appointed*, the limitations period is set in motion."

Id. at 590 (emphasis supplied).

If Petitioner were in the Fourth, Seventh, Eighth, or Tenth Circuit, Petitioner would have had two years to commence Avoidance Actions and not sixteen months. This Court should issue its writ to eliminate the conflict between the courts of appeals.

B. *The Decision below Is a Departure from this Court's Rules of Statutory Construction and from the Plain Meaning of Section 546 so as To Call for an Exercise of this Court's Supervisory Powers.*

This Court has established time-tested principles for interpreting Congressional enactments. *See Maxway*, 27 F.3d at 982-83 (collecting cases). These principles establish that the plain meaning of § 546 should control unless it would produce an absurd result. Unfortunately, the court below employed case law to extend the statute beyond what its plain meaning can support. A different panel of the Ninth Circuit explained:

> If the statute's language were our only guide, the case would be straightforward: Mitchell, a trustee appointed under section 1104 of the Bankruptcy Code, would have two years from its appointment in which to file a complaint to recover preferences. However, we are bound *not only* by the plain language of the statute, *but by three prior decisions that together complicate matters somewhat*.

Hanna, 72 F.3d at 115 (emphasis supplied).

The decision below extends case law until it no longer can support, but is in direct conflict with, the plain meaning of the Bankruptcy Code. There is no plausible explanation why the first trustee appointed in *San Joaquin* and *Hanna* received two years after the appointment to

commence Avoidance Actions but Petitioner below had only sixteen months. *Hanna*'s admonition was that § 546 "*explicitly requires*" the limitations period to commence after appointment of a trustee under a section enumerated in § 546. Even though *Hanna* chided a defendant for using the *IRFM* syllogism, the court below rejected the suggestion for an en banc hearing. This Court should issue its *writ of certiorari* to re-establish the principle that the plain meaning of statutes control, not precedent when it reaches a result the plain meaning cannot support.

C. *A Decision in this Case Is Important to the Thousands of Pending Cases that Were Filed before the Amendment to Section 546.*

In 1994, Congress amended § 546(a). This amendment applies only to cases commenced after its effective date. Public Law 103-394, October 22, 1994, (*see* 11 U.S.C. § 101 note). There are approximately 90,000 pending chapter 7 and chapter 11 bankruptcy cases in the United States that were filed before the effective date of the amendment to § 546. Each of these cases is subject to the unamended version of § 546. The decision below, if left undisturbed, will negatively impact the work of trustees who are trying to maximize estates for the benefit of creditors. As here, Petitioner relied on what the statute said in commencing suit when he did. Petitioner, and thousands like him, should not be penalized for relying on the plain meaning of the statute. This Court should issue its *writ* to preserve for the benefits of creditors in

thousands of pending bankruptcy cases the right to recover preferential and fraudulent transfers.

D. *The Decision below Will Have a Negative Impact on the Amended Statute.*

As stated above, the amendment to § 546(a) applies only to cases filed after October 22, 1994. Even though the decision below applies to the pre-amended version of § 546, the holding of *Sahuaro* will impact cases subject to the amended statute.

The district court ruled alternatively that the limitation period for a chapter 7 trustee begins after the *interim* trustee is appointed under § 701. The district court concluded that *San Joaquin* overruled *Conco*, cited above, so § 546 should commence after the appointment of the *interim* trustee. *Clark Oil v. Haberbush*, 170 B.R. at 693 n. 3.

> The amended statute now reads:
>
> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--
>
> (1) the later of--
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section

> 702, 1104, 1163, 1302, or 1202 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a) (West, 1996).

Despite the amendment, a chapter 7 trustee will not receive the one-year period the amendment promises because the time period for a chapter 7 trustee will commence after the *interim* trustee is appointed under § 701. The *first trustee* in a chapter 7 case is *always* the *interim* trustee, so the new one-year period will start before the permanent trustee even has a chance to examine the debtor at a § 341(a) meeting of creditors.

Granting this petition will reduce the abundance of motions and appeals of litigants on both sides trying to resolve when the amended statute starts to run for a chapter 7 trustee.

CONCLUSION

The decision to grant this petition will eliminate the conflict between the courts of appeals and establish uniformity among lower courts to maintain a national system of bankruptcy law. Granting this petition will re-establish the plain meaning as the controlling guide in applying the Bankruptcy Code, not case law that reaches a result which the plain meaning cannot support. Accepting jurisdiction of this case will preserve for the benefits of creditors in thousands of pending bankruptcy cases the right to recover preferential and fraudulent transfers. For the reasons set forth above, Petitioner prays this Court to issue its *writ of certiorari* and accept jurisdiction over this matter.

Respectfully submitted,
7 September 1996

Steven J. Lee
Counsel of Record
Law Offices of Steven J. Lee
P.O. Box 263
Placentia, CA 92871
714.996.0123
Attorneys for Petitioner

APPENDICES

APPENDIX A

FILED
APR 29 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re	NO. 94-56341
SAHUARO PETROLEUM & ASPHALT COMPANY, an Arizona Corporation, Debtor.	D.C. No. CV 94 1927-DT
David R. Haberbush, Chapter 7 Trustee, Plaintiff-Appellant, v. Clark Oil Trading Company; NIC, INC.; GIC, INC.; Paul A. Novelly; Lawrence Altmansberger; and Samuel R. Goldstein, Defendants-Appellees.	MEMORANDUM*

Appeal from the United States District Court
for the Central District of California,
Hon. Dickran Tevrizian, District Judge, Presiding

Argued and Submitted March 7, 1996
Pasadena, California

Before: CANBY, BOOCHEVER, and LEAVY, Circuit Judges.

David Haberbush, as the Chapter 7 trustee ("Trustee") for Sahuaro Petroleum & Asphalt Company ("Debtor"), interlocutorily appeals from the district court's reversal of the bankruptcy court's denial of a motion to dismiss filed by certain creditors ("Appellees"). Clark Oil & Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.), 170 Bankr. 689 (C.D. Cal. 1994). We have jurisdiction under 28 U.S.C. § 1292 (b), and we affirm the district court.

----------Footnotes----------

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

----------End Footnotes----------

I

Trustee's first argument on appeal is that the district court erred by concluding that the limitations period of § 546(a) (1) began to run on the date Debtor filed its Chapter 11 petition rather than when Trustee was appointed. This issue has been foreclosed by recent Ninth Circuit case law. See John Mitchell, Inc. v. Steinbrugge (In re Hanna), 72 F.3d 114, 117 (9th Cir. 1996); Mosier v. Kroger Co. (In re IRFM, Inc.), 65 F.3d 778, 780-81 (9th Cir. 1995) (as amended); Ford v. Union Bank (In re San Joaquin Roast Beef), 7 F.3d 1413, 1415-16 (9th Cir. 1993); Upgrade Corp. v. Government Tech. Servs. (In re Softwaire Centre Int'l), 994 F.2d 682, 683-84 (9th Cir. 1993) (per curiam) (as amended).

II

Trustee's second argument, raised for the first time on appeal, is that section 546(a) (1) should have been equitably tolled for the time Trustee needed to examine Debtor's records and investigate Appellees' activities to determine whether fraudulent transfers had taken place. As a general rule, we decline to consider arguments raised for the first time on appeal. Spurlock v. F.B.I., 69 F.3d 1010, 1017 (9th Cir. 1995). This is not "an exceptional case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process," nor is this a situation in which "a new issue arose because of a change in the law while an appeal [was] pending[.]" See id. Trustee argues, however, that review is appropriate because the "issue is purely

one of law, [and] the necessary facts have been fully developed." See id.

Trustee's claim that it took nearly two years for the team of accountants and lawyers he hired to unravel Appellees' alleged misbehavior is not purely an issue of law. See Ernst & Young v. Matsumoto (In re United Ins. Mgt., Inc.), 14 F.3d 1380, 1385-86 (9th Cir. 1994) (equitable tolling under section 546(a) (1) ordinarily requires factual determination of due diligence unless uncontroverted facts permit due diligence to be decided as matter of law).

III

Trustee's final argument, also raised for the first time on appeal, is that the district court erred by dismissing claims VI and XIV, because neither one is subject to section 546(a) (1). For the reasons set forth in Part II, supra, we decline to reach the merits of this contention as well. Because we find no merit to any of Trustee's remaining arguments, the decision appealed from is

AFFIRMED.

APPENDIX B

FILED
JUN 10 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re SAHUARO PETROLEUM & ASPHALT COMPANY, an Arizona Corporation, Debtor.	NO. 94-56341 D.C. No. CV 94 1927-DT
David R. Haberbush, Chapter 7 Trustee, Plaintiff-Appellant, v. Clark Oil Trading Company; NIC, INC.; GIC, INC.; Paul A. Novelly; Lawrence Altmansberger and Samuel R. Goldstein, Defendants-Appellees.	ORDER

Before: CANBY, BOOCHEVER, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Canby and Leavy have voted to reject the suggestion for rehearing en banc, and Judge Boochever has so recommended.

The full court has been advised of this en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

Reported at 170 B.R. 689.

FILED
June 13, 1994
Entered June 14, 1994
U.S. District Court
Central District California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re SAHUARO PETROLEUM & ASPHALT COMPANY, an Arizona Corporation, Debtor. CLARK OIL AND TRADING COMPANY, et. al., Appellants, v. DAVID R. HABERBUSH, Chapter 7 Trustee, Appellee.	CASE No. CV 94-1927 DT ORDER REVERSING THE ORDER OF THE UNITED STATES BANKRUPTCY COURT DENYING THE APPELLANTS', CLARK OIL AND TRADING COMPANY, NIC, INC., GIC, INC., PAUL NOVELLY, LAWRENCE ALTMANSBERGER, AND SAMUEL R. GOLDSTEIN, MOTION TO DISMISS THE FIRST THROUGH SIXTH AND FOURTEENTH CLAIMS FOR RELIEF ASSERTED IN THE AMENDED COMPLAINT BY CHAPTER 7 TRUSTEE DAVID R. HABERBUSH AND FINDING THE CLAIMS ARE TIME-BARRED. ORDER REMANDING THE QUESTION OF WHETHER THE SEVENTH AND EIGHTH CLAIMS OF RELIEF ARE GOVERNED BY SECTION 546(A)(1) TO THE BANKRUPTCY COURT FOR FURTHER DETERMINATION.

Background

The debtor, Sahuaro Petroleum and Asphalt Company ("Sahuaro"), was a distributor of asphalt and asphalt-related

by-products. Sahuaro was one-hundred percent owned by another Chapter 7 debtor, Edgington Oil Company ("Edgington"), which was Sahuaro's primary provider of asphalt product. In September 1989, Clark Oil and Trading Company ("Clark"), a Missouri partnership, purchased a fifty percent interest in Edgington. Clark's general partners are NIC, Inc. and GIC, Inc., both Missouri Corporations.

On March 21, 1991, Sahuaro filed for protection under Chapter 11 of the Bankruptcy Code. On September 5, 1991, the case converted to Chapter 7, and, on September 21, 1991, David R. Haberbush ("Haberbush") was appointed as the Sahuaro trustee.[1/] On November 4, 1993, Haberbush filed an adversary action alleging fourteen claims for relief.

On or about January 6, 1994, defendants, Clark Oil and Trading Company, NIC, Inc., GIC, Inc., Paul A. Novelly, Lawrence Altmansberger and Samuel R. Goldstein (moving "Defendants or Appellants"), filed a Motion to Dismiss in U.S. Bankruptcy Court, Case No. LA 91-68910 WL, the adversary action brought by Haberbush against the Defendants.[2/] On February 22, 1994, Judge Lasarow denied Defendants' Motion to Dismiss. On March 28, 1994, Defendants filed a Motion for Leave to Appeal to this Court. This case was assigned Case Number CV 94-1927 DT. On April 4, 1994, this Court granted Defendants' Motion for Leave to Appeal. On April 22, 1994, Appellants filed their Opening Brief. On May 9, 1994, Appellee filed his opposition to appeal. This matter is presently before this Court.

Discussion

---

[1] On review of the Notice of Appointment, this Court finds that the appointment date was in fact September 9, 1991; however, this confusion does not affect the merits of this appeal.

[2] Haberbush, in his opposition, characterizes the defendants as "Ignominious Insiders". This Court finds such a portrayal as juvenile and in violation of the Local Rules reference to civility.

A. Standard

Decisions by bankruptcy judges may be appealed to the district court pursuant to 28 U.S.C. § 158(a). Ordinarily, this review is limited to whether the underlying court had substantial evidence before it to support the decision and whether the decision is contrary to law. However, if the bankruptcy court was deciding a "noncore" matter, review must be de novo. Bankruptcy Rule 9033; In re Lockard, 884 F.2d 1171, 1174 (9th Cir. 1989); In re Foodsource, Inc., 130 Bankr. 549, 552 (N.D. Cal. 1991).

B. The Filing Of A Chapter 11 Petition Commences The Statute Of Limitations Period Under Bankruptcy Code § 546(a)(1) For All Representatives Of The Estate.

Bankruptcy Code § 546 establishes a two-year limitations period on many of the claims most commonly asserted in bankruptcy court adversary proceedings, including fraudulent transfers and preference claims. Recent decisions in In re Softwaire Centre Int'l, Inc., 994 F.2d 682 (9th Cir. 1993) and In re San Joaquin Roast Beef, 7 F.3d 1413 (9th Cir. 1993) establish a uniform rule for bankruptcy cases dictating when the § 546(a)(1) limitations period commences and expires. The statute of limitations begins to run on the date the first estate representative takes office and expires two years later, even if the estate representative's identity changes in the interim. In proceedings that begin as debtor in possession cases, as the Sahuaro bankruptcy did, the limitations period begins to run on the petition date, and expires two years later. In this instance, the statute was triggered on March 21, 1991 and expired on March 21, 1993, approximately six months prior to the time Haberbush filed the adversary action.

1. The Statute Of Limitations Under Section 545 [sic](a)(1) Commences Upon The Filing Of A Chapter 11 Petition And Expires Two Years Later.

a. In a Debtor In Possession Case, The Statute Of Limitations For Section 546 Claims Commences On The Petition Date.

In Softwaire Centre, a debtor in possession case, the debtor filed an action which included § 546 claims more than two years after the petition date. Softwaire Centre, 994 F.2d 682. The defendants in that action moved to dismiss the suit, arguing that

the limitations period of § 546 applied to all representatives, not only to bankruptcy trustees, and therefore, the statute of limitations expired on the two-year anniversary of the petition date. Id.

The Ninth Circuit concluded that since debtors in possession have the same rights, powers, and duties as bankruptcy trustees and are subject to all the same limitations, debtors in possession and bankruptcy trustees are "functional equivalent[s]". Id. In other words, because the interests of the estate are equally well-protected regardless of who is serving as the estate representative, all estate representatives should be bound by the same two-year limitations period:

[Section] 546(a) must be read in conjunction with § 1107(a). Not only does § 1107(a) by its terms subject debtors in possession to the limitations imposed on trustees, the legislative history also makes the point. As the Senate Report accompanying the Bankruptcy Reform Act of 1978 makes clear: '[Section 1107] places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee . . .'

Id. at 683 (quoting S.Rep No. 95-989, 95th Cong., 2nd Sess. 116 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5902 (emphasis added)). Thus, the Ninth Circuit held that all estate representatives should be subject to the two-year limitations period of § 546(a)(1). Id.

In In re Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990), the debtor filed a Chapter 11 petition in September of 1984. No trustee was appointed, however. More than four years later, the debtor's successor in interest pursued an avoidance action against one of the debtor's creditors. The creditor moved to dismiss on the grounds that a debtor in possession has only two years in which to file a claim governed by § 546. The plaintiff disagreed arguing that the statute of limitations set forth in § 546 only applies to trustees, not debtors in possession. Id. at 1524. The Tenth Circuit disagreed:

We believe § 546 is ambiguous; therefore, it must be construed. We do not believe that Congress intended to limit actions filed by an appointed trustee to two years without making the same restriction apply to a debtor in possession who is the functional equivalent of an appointed trustee. Because of the virtual identity of function between a trustee and a debtor in possession, there would be no reason to create a different limitation period for the filing of actions by the two fiduciaries.
Id.

Similarly, in In re Coastal Group, Inc., 13 F.3d 81 (3d Cir. 1994), the debtor in possession filed an avoidance action against an unsecured creditor more than three years after it had filed its Chapter 11 petition. The creditor moved to dismiss because the claim was time-barredas [sic]. The bankruptcy **[*692]** court agreed and dismissed the case. The Court held that because § 1107 grants debtors in possession the same powers as trustees, debtors in possession must also be subject to the same limitations as bankruptcy trustees, noting that: "One of the limitations on the rights and powers of the trustee is the time bar set forth in [Section] 546(a)(1)." Id. at 84. Accordingly, the Third Circuit concluded that the debtor in possession filed its claim too late.

In Chapter 11 debtor in possession cases, the debtor generally becomes the estate representative on the petition date. Softwaire Centre. This Court concludes, as will be more fully discussed below, that Sahuaro's bankruptcy began with Sahuaro serving as a Chapter 11 debtor in possession. Therefore, under Softwaire Centre, the § 546(a)(1) limitations period commenced on the petition date, March 21, 1991 and expired on the two year anniversary of the petition date, March 21, 1993, six months before Haberbush filed the adversary action. Accordingly, this Court finds that the first through sixth, and fourteenth claims for relief are time-barred.

b. The Appointment Of A Successor Estate Representative Does Not Restart The Section 546 Limitations Period.

In San Joaquin Roast Beef, a Chapter 7 trustee brought an action governed by § 546 within one year of his appointment, but more than two years after the debtor filed his Chapter 11 petition. The trustee argued that his appointment restarted the two year

limitations period. The Ninth Circuit disagreed and held that a Chapter 7 trustee, in a case converted from Chapter 11, does not receive a new two-year period in which to assert § 546 claims. San Joaquin Roast Beef, 7 F.3d at 1416.

The Ninth Circuit's determination that an estate representative's successor does not receive a new two-year period is consistent with the goals of § 546 and with the statute of limitations -- to provide specific time limits within which "to put the adversary on notice to defend." United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 3557, 62 L. Ed. 2d 259 (1979). Moreover, § 546 does not contemplate multiple periods of limitation for each and every trustee in a bankruptcy case. Such a rule would entirely frustrate a potential bankruptcy defendant's ability to rely on the fact that the time for filing avoidance claims expired. Accordingly, once the "specified time period" for asserting claims under § 546(a)(1) commences, it does not begin again simply because the estate representative has changed. As such, this Court finds that the statute of limitations did not restart when the status of the estate representative changed.

c. EPI Products Correctly Concludes That The Statute Of Limitations Commences From The Petition Date And Expires Two Years Later.

The debtor in In re EPI Products USA, Inc., 162 Bankr. 1, (Bankr. C.D. Cal. 1993), filed a Chapter 11 petition in August of 1990. Soon thereafter, the case converted to Chapter 7. Approximately nine months after his appointment, but more than two years after the Chapter 11 petition date, the Chapter 7 trustee filed an adversary action asserting a variety of claims governed by § 546. Concluding that the action filed by the Chapter 7 trustee in EPI Products was time-barred, the Bankruptcy Court stated:

Relying upon the determination made in the San Joaquin Roast Beef case, . . . that the conversion to a chapter 7 proceeding does not create a new period of limitations prescribed under § 546(a), and relying upon the Softwaire [Centre] case, . . . holding that § 546(a) applies to debtors in possession and commences to run from the petition date, this bankruptcy court concludes that in the instant case the two-year statute of limitations prescribed in

Section 546(a) commenced on the date of the filing of the original Chapter 11 Petition and terminated two years later . . .
162 Bankr. at 4.

This Court concludes that the Ninth Circuit decisions in Softwaire Centre and San Joaquin Roast Beef, and the Bankruptcy Court decision in EPI Products warrants reversal of Judge Lasarow's Order in regards to Appellants' Motion to Dismiss. This Court finds that Haberbush filed the adversary action more than two and a half **[*693]** years after Sahuaro filed his Chapter 11 petition. Accordingly, this Court finds that the first through sixth and fourteenth claims for relief sought by Haberbush are time-barred by the statute of limitations.

C. The Statute Of Limitations Period Under Bankruptcy Code Section 545(a)(1) Commences Against A Chapter 7 Trustee On the Date He Is First Appointed As Trustee.

1. The Statute Of Limitations Commences On The Date Of The Appointment Of The First Trustee, Which Is The Interim Trustee In A Chapter 7 Case.

Appellants contend that the statute of limitations begins to run from the appointment of the first estate representative, whether that estate representative is a debtor in possession or a trustee because that is the only way to reconcile Softwaire Centre and San Joaquin Roast Beef. This Court concludes that Haberbush's claims are barred even if the statute began running on the date he was appointed, because under San Joaquin Roast Beef, "the statute begins running from the date the first trustee is appointed." San Joaquin Roast Beef, 7 F.2d 1413 at 1416. Haberbush became the "first trustee" in the present case on September 21, 1991, the date on which he was appointed interim trustee -- two years and six weeks before Haberbush filed the adversary action.

a. The Limitations Period For Section 702(d) Trustees Commences On The Date That Person Is Appointed Interim Trustee.

Section 546(a)(1) refers to trustees "appointed under" five Bankruptcy Code Sections, one each in Chapter 7, 12, and 13, and two in Chapter 11. Section 701 is the only part of Chapter 7 that discusses the appointment of Chapter 7 trustees. That

Section addresses the appointment and responsibilities of the interim trustee. Section 701 places no limits on the powers of an interim trustee, nor does any other Chapter 7 provision. "The interim trustee . . . must comply with the same rules and regulations as a permanent trustee." 4 Collier on Bankruptcy P 701.04. Indeed, all Chapter 7 trustees, including the interim trustee, have the same rights, powers, and duties, including the power to assert claims governed by § 546(a)(1). It is not the least bit uncommon for an interim trustee to assert avoidance actions. Therefore, this Court finds that an interim trustee must be bound by the § 546 statute of limitations.

b. Notwithstanding The Reference In Bankruptcy Code Section 546 To Section 702, The Action Filed By Haberbush, As A Section 702(d) Trustee, Is Time-Barred.

Section 546 actually cross-references § 702, not § 701; however, this fact does not alter the Court's analysis. Section 702 describes a variety of ways in which a permanent trustee takes office. After the appointment of the interim trustee, at the first meeting of creditors pursuant to § 341, the creditors have three options: 1) elect a replacement trustee; 2) elect to retain the interim trustee, or 3) do nothing; in which case, the interim trustee will remain pursuant to § 702(d). In this case, the creditors took the third option. As such, this Court finds that Haberbush is a § 702(d) trustee.

Haberbush was fully empowered to act as trustee from the date of his appointment. The § 546 statute of limitations, therefore, must expire two years from that date.[3]

---

[3] Judge Lasarow stated he agreed that for Chapter 7 trustees, the two year statute of limitations period should begin with the appointment of the interim trustee. Transcript 1:15-17; Transcript 10:24-11:1. However, Haberbush argued and Judge Lasarow concluded that a 1989 decision by the Ninth Circuit Bankruptcy Appellate Panel obliged the court to rule that the statute of limitations began to run on the date of Sahuaro's initial meeting of creditors - one year and 364 days before Haberbush filed the

This Court finds that Haberbush had two years from the date of his appointment as interim trustee to file those claims governed by § 546. Instead, Haberbush allowed this two year period to expire, filing just before **[*694]** the two year period commencing after the § 341 meeting. Allowing Haberbush to continue pursuing the claims governed by § 546 would extend the statute of limitations period of two years by six weeks which is impermissible.

Accordingly, this Court REVERSES the Bankruptcy Court's Order denying Appellants' Motion to Dismiss the first through sixth, and fourteenth claims for Relief in Haberbush's First Amended Complaint. n4 Furthermore, this Court REMANDS the issue of whether the seventh and eighth claims for relief are governed by § 546(a)(1) for further proceedings in the Bankruptcy Court.[4]

IT IS SO ORDERED.
DATED: JUN 13 1994
Dickran Tevrizian, Judge

---

adversary action. *See, In re Conco Building Supplies, Inc.*, 102 Bankr. 190 (Bankr. 9th Cir. 1989)

This court disagrees. As is noted above, this Court finds that the decisions of San Joaquin Roast Beef and Softwaire Centre are controlling.

[4] The parties apparently disagree on whether the seventh and eighth claims for relief, for avoidance and invalidation of liens and for determination, validity, and priority and extent of liens, respectively are governed by Bankruptcy Code § 546(a)(1). The evidence presented to this Court does not establish that Haberbush challenged the Appellants' argument in the Bankruptcy Court that these claims are governed by § 546(a)(1). Thus, this Court remands this question, namely whether the seventh and eighth claims for relief are governed by § 546(a)(1), for further proceedings in the Bankruptcy Court.

APPENDIX D

ROQUEMORE, PRINGLE & MOORE, INC.
STEVEN J. LEE, Esq. *State Bar No.: 134499*
6055 East Washington Blvd., Suite 430
Los Angeles, CA 90040-2466
(213) 724-3200 Ext. 329

Attorneys for David R.
Haberbush, Chapter 7 Trustee

Lodged
Filed

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re SAHUARO PETROLEUM & ASPHALT COMPANY, an Arizona Corporation, Debtor. _____	CASE NO. LA 91-68910-WL Chapter 7 Adv. No. LA 93-04194-WL
David R. Haberbush, Chapter 7 Trustee, Plaintiff, vs. Clark Oil and Trading Company; NIC, INC., GIC, INC., Paul A. Novelly, Lawrence Altmansberger, and Samuel R. Goldstein Defendants.	**ORDER DENYING MOTION OF DEFENDANTS TO DISMISS** DATE: February 9, 1994 TIME: 9:00 a.m. PLACE: COURTROOM 1539 ROYBAL BUILDING 255 E. Temple St. Los Angeles, CA 90012

The motion of Clark Oil Trading Company, NIC, INC., GIC, INC., Paul A. Novelly, Lawrence Altmansberger, and Samuel R. Goldstein to dismiss came on regularly before the Court, the Honorable William J. Lasarow, United States Bankruptcy Judge, presiding. Appearing at the hearing on behalf of Plaintiff was

Steven J. Lee. Appearing at the hearing on behalf of Defendants were Paul S. Aronzon and David A. Jones.

The Court, having considered the pleadings filed for and in opposition to the Motion to Dismiss, and having heard oral argument, and good cause appearing

It is hereby ORDERED that the Motion To Dismiss is **Denied**.

DATED: February 22, 1994

By /s/
William J. Lasarow
UNITED STATES BANKRUPTCY JUDGE

Submitted By:
ROQUEMORE, PRINGLE & MOORE, INC.

By: /s/
STEVEN J. LEE, Attorney for David R. Haberbush, Chapter 7 Trustee

APPENDIX E

ROQUEMORE, PRINGLE & MOORE, INC.
Steven J. Lee, Esq., SB #134499
6055 East Washington Blvd., Suite 430
Los Angeles, CA 90040-2466
(213) 724-3200 Ext. 329
Attorneys for David R.
Haberbush, Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re SAHUARO PETROLEUM & ASPHALT COMPANY, an Arizona Corporation, Debtor. DAVID R. HABERBUSH, Chapter 7 Trustee, Plaintiff, vs. CLARK OIL AND TRADING COMPANY, a Missouri partnership; NIC, INC., a Missouri corporation; GIC, INC., a Missouri corporation; PAUL A. NOVELLY also known as TONY NOVELLY, an individual; LAWRENCE ALTMANSBERGER also known as LARRY ALTMANSBERGER, an individual; and SAMUEL R. GOLDSTEIN also known as SAM R. GOLDSTEIN also known as SAM GOLDSTEIN, an individual, Defendants.	CASE NO. LA 91-68910-WL Chapter 7 Adv. No. LA 93-4194-WL AMENDED COMPLAINT FOR 1- 4. AVOIDANCE OF FRAUDULENT TRANSFERS; 5. AVOIDANCE OF PREFERENTIAL TRANSFERS; 6. RECOVERY OF AVOIDED TRANSFERS; 7. TO VALUE, AVOID, AND INVALIDATE LIENS; 8. TO DETERMINE VALIDITY, PRIORITY, OR EXTENT OF LIENS; 9. EQUITABLE SUBORDINATION; 10. OBJECTION TO CLAIMS; 11. FRAUD AND DURESS; 12. UNDUE INFLUENCE, CONSTRUCTIVE FRAUD; 13. ALTER EGO ON CORPORATE OBLIGATIONS 14. DAMAGES AGAINST DIRECTORS FOR APPROVING IMPROPER DISTRIBUTION TO SHAREHOLDERS HEARING DATE TO BE SET BY SUMMONS

COMES NOW PLAINTIFF AND ALLEGES:

JURISDICTION AND VENUE

1 This complaint sets forth claims for relief, jurisdiction over which is based upon 28 U.S.C. § 1334(b), in that this is a civil proceeding arising under and in the above-titled bankruptcy case. This proceeding is an adversary proceeding, as defined in Fed. R. Bankr. P. 7001(1). This Bankruptcy Court has jurisdiction of this adversary proceeding based upon 28 U.S.C. § 157(a). This adversary proceeding is a "core proceeding," as defined in 28 U.S.C. § 157(b)(2) and, as such, the bankruptcy court may enter final orders with respect to this proceeding.

2 Venue of this adversary proceeding is based upon 28 U.S.C. § 1409.

3 Sahuaro Petroleum & Asphalt Company, an Arizona corporation ("Sahuaro"), is a wholly-owned subsidiary of Edgington Oil Company, Inc., a Delaware corporation ("Edgington"). Edgington is a debtor in a chapter 7 proceeding in the United States District Court for the Central District of California, case no. LA 91 68062-WL. Sahuaro filed a petition for relief under Title 11, Chapter 11, United States Code, on March 21, 1991.

4 On September 5, 1991 Sahuaro's bankruptcy case was converted to one under Chapter 7 of Title 11, United States Code. On September 21, 1991 David R. Haberbush was appointed interim Chapter 7 Trustee. On November 6, 1991 Mr. Haberbush conducted the meeting of creditors authorized and required by 11 U.S.C § 341(a) and became the Trustee of the estate of In Re Sahuaro Petroleum and Asphalt Company.

PARTIES

5 Plaintiff David R. Haberbush ("Plaintiff") is the duly qualified, appointed, and acting trustee of the Chapter 7 estate of Sahuaro.

6 Clark Oil and Trading Company, a Missouri partnership ("Clark"), is the owner of 50% of the outstanding shares of common stock of Edgington Oil Company ("Edgington"). Edgington is the parent corporation of Sahuaro and owns 100% of Sahuaro's common stock. Clark is an "affiliate" and an "insider" of Sahuaro as those terms are described in 11 U.S.C. § 101.

7 NIC, Inc. ("NIC") is incorporated under the laws of the State of Missouri and is a general partner of Clark. NIC is an "affiliate" and an "insider" of Sahuaro as those terms are described in 11 U.S.C. § 101.

8 GIC, Inc. ("GIC") is incorporated under the laws of the State of Missouri and is a general partner of Clark. GIC is an "affiliate" and an "insider" of Sahuaro as those terms are described in 11 U.S.C. § 101. Clark, NIC, and GIC, shall be referred to collectively as "**DEFENDANTS**."

9 Paul A. Novelly ("Novelly") is an individual. Plaintiff is informed and believes and thereon alleges that Novelly is an "affiliate" and an "insider" of Sahuaro as those terms are defined in 11 U.S.C. §101.

10 Lawrence Altmansberger aka Larry Altmansberger ("Altmansberger") is an individual. Plaintiff is informed and believes and thereon alleges that Altmansberger is an "affiliate" and an "insider" of Sahuaro as those terms are defined in 11 U.S.C. §101.

11 Samuel R. Goldstein aka Sam Goldstein and Sam R. Goldstein ("Goldstein") is an individual. Plaintiff is informed and believes and thereon alleges that Goldstein is an "affiliate" and an "insider" of Sahuaro as those terms are defined in 11 U.S.C. §101.

GENERAL ALLEGATIONS

12 In or about June 1983, Edgington Oil Company was sold to Newedge, Inc., which was owned 50/50 by Triad Corp. (which was controlled by Adnan Kashoggi) ("Kashoggi") and Los Angeles Steamship Company. The purchase price was $33 million, payable $25 million in cash and an $8 million promissory note. At time of the transaction, Newedge also sold a marine terminal to a third party for cash.

13 On or about February 15, 1984 Triad restructured Newedge, contributing Oasis Aviation Fuels (aka Triad Aviation Fuels) and Agrifuels Refining Corporation to Newedge, retiring debt owed to Los Angeles Steamship Company and borrowing $33 million; $18 million from First Boston Corporation ("First Boston") and $15 million from Executive Life Insurance Company ("Executive Life"). Aetna Casualty and Surety Company, a Connecticut corporation ("Aetna"), guaranteed the $33 million in debts through the issuance of an Indemnity Bond secured by the assets of Newedge and its wholly-

owned subsidiary, Sahuaro. As a result of the restructuring, Triad owned 100% of Newedge and changed the name of Newedge to Edgington Oil Company.

14 In or about 1986 Edgington Oil Company filed for bankruptcy protection.

15 On or about June 15, 1986, Edgington Oil Company offered its assets for sale through the Bankruptcy Court. Kashoggi was a director and shareholder of Skyhigh, a company bidding for the assets of Edgington Oil Company. On October 31, 1986 Triad sold the assets of Edgington Oil Company directly to Skyhigh without the advice of First Boston or creditors' consent. On December 10, 1986 Sheraton Corporation and on January 15, 1987 Aetna obtained injunctions blocking the sale to Skyhigh.

16 The Bankruptcy Court approved the sale of the assets of Edgington to Sulphur Mountain Oil Company ("SMOC"). On or about August 29, 1988 SMOC assigned its purchase rights to Edgington Oil Co. No. 1, Inc. ("EOC No. 1"), which was formed by Castellucci. Castellucci owned 84.7% of the stock of EOC No. 1 and officers of EOC No. 1 owned the remaining stock.

17 On September 1, 1988 EOC No. 1 bought certain Edgington assets, including the refinery, and all Sahuaro and Oasis Aviation stock for $57 million. In order to finance the transaction, Edgington obtained a loan from Wells Fargo Bank, N.A. ("Wells") for $30 million ("Term Loan") which was secured by first priority liens on the real and personal property of Edgington. EOC No. 1 received $27 million in cash from a contemporaneous sale of Signal Hill Petroleum Distribution Center. Of the proceeds, $15 million was paid to Executive Life, thus reducing Aetna's exposure on its guaranty. Edgington assumed the pre-existing obligations to First Boston. EOC No. 1 changed its name to Edgington Oil Co., Inc. ("Edgington").

18 As part of the same transaction, Wells extended to Edgington a revolving line of credit with a maximum credit limit of $25 million ("Working Capital Agreement") to enable Edgington to operate the refinery.

19 In conjunction with these transactions, Sahuaro executed a Subsidiary Term Loan Guaranty in favor of Wells for $30 million and a General Continuing Working Capital Guaranty in favor of Wells for $25 million, granting Wells a first

priority lien on all real and personal property assets of Sahuaro. These security interests were perfected through the recordation of deeds of trust and the filings of UCC-1 Financing Statements.

20 Sahuaro also guaranteed the debts of Edgington to Aetna that existed before the sale.

21 Effective September 1, 1988, Edgington and its affiliate, SMOC, entered into a Compensation Agreement whereby Edgington was to pay SMOC $1.8 million for certain services that SMOC was to perform for Edgington.

22 On or about September 2, 1988, First Boston filed a UCC-1 Financing Statement for the indebtedness of Edgington to First Boston securing such indebtedness against the personal property of Sahuaro. First Boston also received deeds of trust on all real property of Sahuaro.

23 On or about February 17, 1989 Glenfed Financial Corporation ("Glenfed") acquired the First Boston claims and liens and all of First Boston's interests in the Aetna Indemnity Bond. The liens included the security interests in the real and personal property assets of Sahuaro. Glenfed extended the maturity date of the First Boston claims to February 15, 1993 and subordinated the liens of First Boston to the liens of Wells. Aetna issued a replacement bond ("New Aetna Bond") in favor of Glenfed for the account of Edgington, securing repayment of the First Boston claims which Glenfed held. Edgington agreed to indemnify Aetna for any amounts Aetna had to pay Glenfed on the New Aetna Bond. Edgington granted Aetna a lien against $3 million in Certificates of Deposit which Edgington owned and Sahuaro again guaranteed the indebtedness of Edgington to Aetna, which guaranty was secured by liens against the real and personal property assets of Sahuaro.

24 Almost immediately after Edgington executed the Term Loan and the Working Capital Loan, Edgington began to breach individual covenants and obligations of the agreements.

25 In or about March 1989, Wells became aware of certain breaches and defaults of the Term Loan and the Working Capital Loan. As a result, on or about May 10, 1989 Edgington and Wells entered into a Limited Waiver Agreement under the Term Loan and a Limited Waiver Agreement under the Working Capital Agreement whereby Wells forgave certain breaches and defaults of Edgington under the agreements.

26 In exchange for Wells waiving certain breaches and defaults, Edgington and Castellucci agreed not to make any further payments to SMOC under the Compensation Agreement until December 31, 1990 without the approval of Wells. Castellucci also pledged all of his 84.7% of the outstanding stock of Edgington in exchange for Wells extending $3 million of additional credit to Edgington for monies Edgington advanced under the Compensation Agreement and for various other Edgington debts.

27 On or about May 10, 1989 Aetna consented to allow an increase in the senior indebtedness Edgington owed to Wells from $25 million to $35 million.

28 On or about June 23, 1989 Wells increased the Working Capital Agreement line of credit from $25 million to $35 million.

29 Edgington did not believe it had sufficient cash flow to meet its obligations to Wells under the Term Loan or the Working Capital Agreement. As a result, on or about September 26, 1989 Edgington entered into a written letter agreement with Wells, Clark, Aetna, and Castellucci ("Letter Agreement") whereby the parties thereto agreed:

(1) that Clark would make a $3 million equity investment in Edgington divided between a $500,000 investment for which Clark would receive 50% of the outstanding Class A common stock of Edgington and a $2.5 million investment for which Clark would receive redeemable preferred in the face amount of $2.5 million bearing a 5% cumulative dividend;

(2) that Clark would purchase from Wells without representation or warranty all of Wells' right, title, and interest to the Working Capital Agreement, including Wells' secured rights in the collateral of Edgington and Sahuaro;

(3) that Clark would give a promissory note to Wells in an amount equal to the cash advances Wells made to Edgington under the Working Capital Agreement minus $4 million, which was secured by an irrevocable direct pay letter of credit;

(4) that Wells would forgive $3 million of the balance due under the Working Capital Agreement;

(5) that Wells and Edgington would transfer $1 million due under the Working Capital Agreement to

the Term Loan and the Term Loan balance would be increased by $1 million;

(6) that SMOC would forgive approximately $700,000 which Edgington owed to SMOC;

(7) that Wells would release Castellucci from all obligations Castellucci owed Wells under the Working Capital Agreement;

(8) that Wells would amend the Term Loan to provide that as to $5 million under the Term Loan there would be no principal payments for approximately three years and four months;

(9) that as to the remaining balance of the Term Loan that exceeded $5 million, Wells would agree that no principal payments were to be made for approximately fifteen months and the amount would be amortized over ten years, although the balance was to be paid in approximately three years and four months;

(10) that Edgington would grant to Wells redeemable preferred in the face amount of $2.5 million bearing a 5% cumulative dividend;

(11) that Aetna would agree that $4.5 million of the amount Edgington owed to Aetna wold be converted to redeemable preferred that was subordinated to the redeemable preferred of Wells except in the case of the liquidation of Edgington, in which case there would be equal priority of distribution between Aetna and Wells;

(12) that as to the remaining balance Edgington owed Aetna there was to be no payment of principal for approximately fourteen months;

(13) that Wells would fund the payroll and other expenses of Edgington;

(14) that Castellucci would buy back from officers of Edgington the 15% of Edgington's stock he did not already own and sell Clark 50% of the stock of Edgington in exchange for Clark's investment (Castellucci would retain the remaining 50% of Edgington stock); and

(15) that Clark would be given the right to place three individuals on the Edgington board of directors (Clark placed P. A. ("Tony") Novelly, Sam R. Goldstein and Larry Altmansberger on the Edgington board of directors).

30 To secure its obligations to Wells to purchase the Working Capital Agreement, Clark obtained a letter of credit from Paribas.

31 Pursuant to the working capital agreement between Edgington and Clark ("Clark Working Capital Agreement") dated October 6, 1989 that replaced the Wells' Working Capital Agreement, Clark advanced to Edgington $7 million evidenced by a promissory note.

32 On or about October 6, 1989 Glenfed assigned its claims, liens, and security interests in the assets of Sahuaro to Aetna.

33 On or about October 6, 1989 Aetna, as successor to First Boston and its assignee, Glenfed, agreed to subordinate its September 2, 1988 deeds of trust and security interests in the real and personal property assets of Sahuaro to the indebtedness Edgington owed to Wells.

34 In order to secure the obligations of Edgington to Clark, on October 6, 1989 Sahuaro executed a Consent of Guarantor to Assignment of General Continuing Working Capital Guaranty, unconditionally guaranteeing the obligations of Edgington to Clark under the Clark Working Capital Agreement. Pursuant thereto, Sahuaro granted Clark a first priority security interest in Sahuaro's personal property, including inventory, accounts receivable, and proceeds therefrom.

35 On October 10, 1989 Sahuaro executed a trust deed in favor of Wells "as agent for the financial institutions who are parties to the [Term] Loan Agreement . . ." which secured the first amendment to the general Term Loan Guaranty, which in turn secured Edgington's Term Loan and Working Capital Agreements.

36 On or about November 14, 1989 Clark increased its advances to Edgington under the Clark Working Capital Credit Agreement to $10 million. On or about March 1, 1990 Clark increased its advances to Edgington under the Clark Working Capital Credit Agreement to $35 million.

37 Edgington continued to suffer operating losses. On or about July 3, 1990, Edgington, Clark, and Paribas entered into the written intercompany credit agreement ("Intercompany Credit Agreement"), whereby Clark and Edgington terminated and replaced the Letter Agreement of September 26, 1989 and extinguished and terminated the claims

of Clark pursuant to the Clark Working Capital Agreement and advances made thereto.

38 Clark and Edgington substituted the Clark Working Credit Agreement between Clark and Edgington, which had been used to fund the operations of Edgington, with a $35 million letter of credit from Paribas. Clark and Edgington executed a promissory note for $35 million payable to Paribas.

39 Clark and Edgington became co-borrowers directly from Paribas.

40 In addition, to evidence the advances from Clark to Edgington pursuant to the Clark Working Credit Agreement, Edgington executed a promissory note to Clark in the amount of $15 million.

41 As additional security for all obligations of Edgington to Clark and Paribas, Sahuaro executed a subsidiary guaranty of intercompany note ("Subsidiary Guaranty of Intercompany Note") on or about July 3, 1990. Pursuant to the Subsidiary Guaranty of Intercompany Note, Sahuaro granted Clark a first priority security interest in all of Sahuaro's real and personal property.

42 Concurrent with the execution of the Intercompany Credit Agreement, Sahuaro executed the Subsidiary Guaranty and Subsidiary Security Agreement to secure all of the obligations of Edgington to Paribas.

43 On July 3, 1990 Edgington had a stated net worth of negative $14 million.

44 Sahuaro operated from various locations in the State of Arizona and was principally involved in the blending and sale of asphalt products. During normal business operations, Sahuaro, among other things, blended and stored liquid asphalt in tanks until that asphalt was sold. Sahuaro's assets consisted of blending and storage facilities, vehicles, real estate, leases and other properties necessary to the operation of its business.

45 Haberbush received an offer for the purchase of the major portion of Sahuaro's assets from Vinzoyl Petroleum Company ("Vinzoyl"). Pursuant to the terms of the offer, Vinzoyl purchased the following property:

(1) The Phoenix terminal located at 1935 West McDowell Street, Phoenix, Arizona, including tanks, buildings, equipment, leased real estate, laboratory equipment, trucks, trailers, tools, spares and specialty equipment;

(2) The Flagstaff terminal located at 840 East Butler, Flagstaff, Arizona, including tanks, equipment, buildings and other improvements, a lease of real property and all related personal property and equipment;

(3) Tanks and other equipment located on a site owned or operated by Ernesto Cruz (dba as Aztex Asphalt and Emotions, Inc.) located approximately 20 miles south of the United States-Mexico Border;

(4) Real estate located at 731 North 19th Avenue, Phoenix, Arizona together with all improvements situated thereon;

(5) Real estate located in Randolph, Arizona;

(6) All contractual rights and any rights to enforce environmental remediation obligations belonging to Debtor with respect to Arizona Refining Company or Unocal Corporation;

(7) All work papers, procedures manuals, recipes, patents, copyrights, technical information, trade secrets, or other intellectual property, operating manuals, books, files, records and so forth of Debtor;

(8) All licenses, permits, registrations and other like documents or all trucks, trailers and other rolling stock and vehicles;

(9) All radio-mobile telephone and related equipment, licenses, permits, towers, leases and the like;

(10) All rights to the name SAHUARO PETROLEUM & ASPHALT and any variance thereof;

(11) All rights of Debtor under confidentiality agreements and non competition agreements executed by employees, officers and agents of Debtor;

(12) All office equipment and furniture and computer equipment and software;

(13) Inventory and contents of tanks, drums and other containers;

(14) All rights of Debtor to recover any of the foregoing described property from any persons not in rightful possession thereof;

(15) All improvements, fixtures, equipment, personal property and other appurtenances related to any of the foregoing described items;

(16) The assumption of a land lease dated September 1, 1976 between the Atchison, Topeka and Santa Fe Railway Company and Santa Fe Pacific Realty Corporation and Arizona Refining Company (contract number SFLI-2198/151002);

(17) Contract for Industry Tract dated March 1, 1975 between the Atchison, Topeka and Santa Fe Railway Company and Arizona Refining Company (contract number 70167);

(18) Contract for Industry Tract dated November 26, 1980 between the Atchison, Topeka and Santa Fe Railway Company and Arizona Refining Company as amended and modified (contract number 70544-162137);

(19) Lease of land dated January 1, 1973 between the Atchison, Topeka and Santa Fe Railway Company and Arizona Refining Company (lease contract number 143160);

(20) Lease of land dated March 20, 1962 between the Atchison, Topeka and Santa Fe Railway Company and Arizona Refining Company (lease contract number 67072);

(21) Contract for Industry Tract dated September 1, 1970 between the Atchison, Topeka and Santa Fe Railway Company and Arizona Refining Company (contract number unknown);

(22) Assumption of contract for Industry Tract dated December 1, 1961 between the Atchison, Topeka and Santa Fe Railway Company and Arizona Refining Company (contract number unknown); and

(23) Assumption of contract for Industry Tract dated June 10, 1983 between the Atchison, Topeka and Santa Fe Railway Company and SAHUARO PETROLEUM & ASPHALT COMPANY (contract number 167651).

46 On or about December 19, 1991 all of Sahuaro's right, title and interest to the property described above was sold for $4,050,000.00. Any liens against property of the estate that was sold attached to the proceeds of the sale to the extent of the validity of the liens under applicable law. The property described above, together with all other property of Sahuaro, had and have a fair market value in an amount less than the amount of all liens against said property.

47 The real and personal property assets of Sahuaro are or may be subject to the following liens and

encumbrances of **DEFENDANTS** or their predecessors or successors in interest: A security interest in all accounts receivable, inventory, documents of title, instruments, deposit accounts and insurance policies in favor of Clark as evidenced by UCC-1 Financing Statements recorded with the Secretary of State for the State of Arizona, and the County Recorders for the County of Coconino and Maricopa, Arizona. Said UCC-1 Financing Statements were amended by the filing of UCC-2 Financing Statements in the counties of Maricopa and Coconino on or about September 10, and September 14, 1990 changing the name of the Debtor to "Debtor: SAHUARO PETROLEUM & ASPHALT CO. ("Grantor")". No UCC-2 Amendment appears of record with the Secretary of State for the State of Arizona. (The indebtedness, security interests, guarantees, claims, and liens referenced above, and any other indebtedness, security interests, guarantees, claims, and liens of Sahuaro to Clark, NIC, GIC, or any predecessors or successors of Clark, NIC, or GIC shall be referred to hereafter as the "**OBLIGATIONS**.")

48 Plaintiff is informed and believes and thereon alleges that Sahuaro transfered to Defendants by passing the funds through Edgington of the following amounts:
The transfers of funds from Sahuaro to **DEFENDANTS** or through Edgington to Defendants set forth above shall be referred to hereafter as the "**TRANSFERS**."

DATE OF TRANSFER	FUNDS AVAILABLE	TRANSFERS TO EDGINGTON FROM SAHUARO
10/12/89	108,594.00	100,000.00
10/13/89	514,117.00	500,000.00
10/16/89	337,933.00	330,000.00
10/17/89	274,875.00	270,000.00
10/18/89	112,209.00	100,000.00
10/19/89	129,772.00	35,000.00
10/20/89	126,432.00	75,000.00
10/23/89	152,942.00	150,000.00
10/24/89	288,949.00	275,000.00
10/25/89	234,997.00	200,000.00
10/26/89	196,307.00	175,000.00

10/27/89	149,765.00	25,000.00
10/30/89	82,823.00	75,000.00
10/31/89	362,751.00	350,000.00
11/01/89	240,967.00	225,000.00
11/02/89	508,345.00	500,000.00
11/03/89	294,000.00	275,000.00
11/06/89	76,959.00	75,000.00
11/07/89	47,095.00	40,000.00
11/08/89	85,647.00	75,000.00
11/09/89	173,847.00	160,000.00
11/10/89	130,794.00	125,000.00
11/13/89	70,705.00	60,000.00
11/14/89	123,190.00	100,000.00
11/15/89	99,688.00	75,000.00
11/16/89	329,677.00	300,000.00
11/17/89	412,972.00	400,000.00
11/20/89	113,200.00	100,000.00
11/21/89	292,315.00	275,000.00
11/22/89	155,047.00	150,000.00
11/24/89	199,727.00	185,000.00
11/30/89	395,975.00	350,000.00
12/01/89	324,281.00	300,000.00
12/04/89	174,687.00	160,000.00
12/05/89	100,578.08	75,000.00
12/06/89	188,723.00	150,000.00
12/07/89	148,791.00	130,000.00
12/08/89	39,762.00	35,000.00
12/11/89	83,500.00	60,000.00
12/12/89	94,635.00	85,000.00
12/13/89	176,537.00	170,000.00
12/14/89	312,571.00	300,000.00
12/15/89	181,533.00	175,000.00
12/18/89	62,054.00	60,000.00
12/19/89	1,098,147.00	1,075,000.00
12/20/89	496,619.00	475,000.00
12/21/89	812,740.00	75,000.00
12/22/89	335,105.00	10,000.00
12/26/90	172,104.00	150,000.00
12/27/89	33,009.00	25,000.00
12/28/89	156,433.00	150,000.00
12/29/89	52,305.00	50,000.00

01/02/90	27,976.00	25,000.00
01/03/90	77,707.00	60,000.00
01/04/90	118,148.00	100,000.00
01/05/90	112,889.00	100,000.00
01/08/90	23,950.00	20,000.00
01/09/90	82,616.00	75,000.00
01/10/90	38,630.00	25,000.00
01/11/90	85,605.00	75,000.00
01/12/90	38,054.00	25,000.00
01/16/90	395,200.00	375,000.00
01/17/90	563,147.00	525,000.00
01/18/90	96,395.00	75,000.00
01/19/90	107,293.00	100,000.00
01/22/90	132,640.00	125,000.00
01/23/90	165,518.00	181,226.72
01/24/90	145,089.00	130,000.00
01/25/90	161,909.00	150,000.00
01/26/90	116,288.00	75,000.00
01/29/90	51,621.00	45,000.00
01/30/90	30,686.00	25,000.00
01/31/90	115,408.00	100,000.00
02/01/90	236,465.00	175,000.00
02/02/90	208,918.00	175,000.00
02/05/90	89,432.00	50,000.00
02/06/90	65,726.00	50,000.00
02/07/90	55,107.00	35,000.00
02/09/90	31,639.00	25,000.00
02/09/90	28,231.00	25,000.00
02/12/90	35,192.00	25,000.00
02/13/90	96,926.00	50,000.00
02/14/90	81,737.00	75,000.00
02/15/90	53,209.00	50,000.00
02/16/90	453,660.00	450,000.00
02/20/90	8,312.00	400,000.00
02/21/90	454,785.00	450,000.00
02/22/90	169,748.00	150,000.00
02/23/90	58,167.00	50,000.00
02/26/90	106,738.00	75,000.00
02/27/90	53,975.00	35,000.00
02/28/90	37,432.00	35,000.00
03/01/90	148,349.00	125,000.00

03/02/90	57,531.00	50,000.00
03/05/90	22,232.00	20,000.00
03/05/90	47,554.00	45,000.00
03/07/90	137,491.00	125,000.00
03/08/90	156,343.00	125,000.00
03/09/90	45,321.00	25,000.00
03/12/90	46,631.00	35,000.00
03/13/90	40,223.00	35,000.00
03/14/90	55,288.00	50,000.00
03/15/90	294,793.00	275,000.00
03/16/90	74,552.00	70,000.00
03/19/90	95,191.00	90,000.00
03/20/90	495,172.00	475,000.00
03/21/90	155,809.00	150,000.00
03/22/90	75,544.00	70,000.00
03/23/90	58,844.00	50,000.00
03/26/90	158,632.00	150,000.00
03/27/90	61,149.00	50,000.00
03/28/90	21,682.00	20,000.00
03/29/90	48,950.00	40,000.00
03/30/90	500,462.00	45,000.00
04/02/90	102,146.00	75,000.00
04/03/90	98,778.00	75,000.00
04/04/90	169,055.00	150,000.00
04/05/90	65,894.00	50,000.00
04/06/90	92,380.00	40,000.00
04/09/90	63,527.00	50,000.00
04/10/90	25,704.00	15,000.00
04/11/90	57,000.00	30,000.00
04/12/90	42,855.00	40,000.00
04/13/90	35,707.00	25,000.00
04/16/90	119,344.00	100,000.00
04/17/90	710,302.00	600,000.00
04/18/90	163,973.00	100,000.00
04/19/90	89,796.00	50,000.00
04/20/90	85,939.00	75,000.00
04/23/90	40,481.00	35,000.00
04/24/90	57,121.00	50,000.00
04/25/90	144,661.00	125,000.00
04/26/90	85,181.00	75,000.00
04/27/90	253,948.00	250,000.00

04/30/90	80,214.00	75,000.00
05/01/90	132,628.00	125,000.00
05/02/90	118,779.00	100,000.00
05/03/90	325,812.00	300,000.00
05/04/90	149,478.00	125,000.00
05/07/90	703,313.00	50,000.00
05/08/90	54,886.00	50,000.00
05/09/90	166,242.00	160,000.00
05/10/90	180,103.00	175,000.00
05/11/90	69,487.00	50,000.00
05/14/90	73,893.00	50,000.00
05/15/90	560,357.00	550,000.00
05/16/90	166,000.00	150,000.00
05/17/90	62,736.00	50,000.00
05/18/90	126,453.00	120,000.00
05/21/90	39,955.00	25,000.00
05/22/90	112,388.00	100,000.00
05/23/90	373,381.00	350,000.00
05/24/90	209,150.00	150,000.00
05/25/90	113,596.00	100,000.00
05/29/90	66,958.00	50,000.00
05/30/90	227,688.00	200,000.00
05/31/90	363,948.00	300,000.00
06/01/90	241,052.00	200,000.00
06/04/90	71,865.00	50,000.00
06/05/90	202,710.00	200,000.00
06/06/90	38,671.00	25,000.00
06/07/90	196,533.00	150,000.00
06/08/90	76,223.00	50,000.00
06/11/90	64,890.00	50,000.00
06/12/90	47,154.00	25,000.00
06/13/90	147,841.00	125,000.00
06/14/90	65,839.00	50,000.00
06/15/90	329,464.00	300,000.00
06/18/90	252,341.00	250,000.00
06/19/90	360,176.00	350,000.00
06/20/90	329,786.00	300,000.00
06/21/90	134,041.00	100,000.00
06/22/90	127,152.00	100,000.00
06/25/90	109,321.00	100,000.00
06/26/90	251,552.00	225,000.00

06/27/90	207,855.00	150,000.00
06/28/90	239,937.00	200,000.00
06/29/90	79,350.00	50,000.00
07/03/90	135,923.00	100,000.00
07/05/90	151,013.00	125,000.00
07/06/90	241,343.00	225,000.00
07/09/90	42,479.00	35,000.00
07/10/90	259,638.00	250,000.00
07/11/90	271,000.00	250,000.00
07/12/90	305,046.00	250,000.00
07/13/90	104,941.00	100,000.00
07/16/90	147,698.00	135,000.00
07/17/90	770,817.00	700,000.00
07/18/90	120,730.00	100,000.00
07/19/90	177,169.00	125,000.00
07/20/90	468,040.00	450,000.00
07/23/90	278,365.00	275,000.00
07/24/90	198,951.00	175,000.00
07/25/90	129,036.00	100,000.00
07/26/90	123,083.00	100,000.00
07/27/90	227,795.00	150,000.00
07/30/90	128,836.00	125,000.00
07/31/90	51,920.00	50,000.00
08/01/90	53,016.00	50,000.00
08/02/90	176,501.00	125,000.00
08/03/90	120,497.00	100,000.00
08/06/90	51,782.00	50,000.00
08/07/90	121,345.00	100,000.00
08/08/90	81,860.00	75,000.00
08/09/90	225,686.00	200,000.00
08/10/90	98,126.00	75,000.00
08/13/90	29,417.00	25,000.00
08/14/90	682,287.00	650,000.00
08/15/90	94,545.00	50,000.00
08/16/90	102,221.00	75,000.00
08/18/90	67,882.00	50,000.00
08/20/90	87,093.00	75,000.00
08/21/90	80,935.00	75,000.00
08/22/90	127,398.00	125,000.00
08/23/90	92,608.00	90,000.00
09/17/90	30,791.73	30,000.00

09/18/90	247,875.59	225,000.00
09/19/90	///	25,000.00
09/20/90	71,251.18	50,000.00
09/21/90	133,441.12	100,000.00
09/24/90	68,775.09	50,000.00
09/25/90	416,692.97	375,000.00
09/26/90	71,454.70	60,000.00
09/27/90	51,071.13	45,000.00
09/28/90	145,916.48	145,000.00
10/01/90	317,972.20	250,000.00
10/04/90	59,870.76	50,000.00
10/05/90	47,739.59	40,000.00
10/09/90	77,835.06	50,000.00
10/10/90	105,851.82	100,000.00
10/11/90	98,048.48	50,000.00
10/12/90	80,976.60	75,000.00
10/15/90	740,273.12	725,000.00
10/16/90	66,083.52	50,000.00
10/17/90	22,754.83	20,000.00
10/18/90	100,429.05	75,000.00
10/19/90	86,747.97	75,000.00
10/22/90	60,496.86	50,000.00
10/23/90	57,244.44	50,000.00
10/24/90	232,933.00	200,000.00
10/25/90	164,308.88	150,000.00
10/26/90	14,842.27	125,000.00
10/29/90	16,901.00	10,000.00
10/30/90	68,953.44	50,000.00
10/31/90	294,751.00	250,000.00
11/01/90	122,677.14	100,000.00
11/02/90	331,570.00	300,000.00
11/05/90	79,416.13	70,000.00
11/06/90	213,313.00	200,000.00
11/07/90	136,275.17	100,000.00
11/08/90	102,830.59	50,000.00
11/09/90	172,088.60	100,000.00
11/13/90	76,833.32	70,000.00
11/14/90	130,736.88	100,000.00
11/15/90	176,221.90	125,000.00
11/16/90	85,913.92	50,000.00
11/19/90	173,597.99	150,000.00

11/20/90	262,918.52	250,000.00
11/21/90	119,803.84	100,000.00
11/23/90	782,183.79	600,000.00
11/26/90	182,183.79	100,000.00
11/27/90	845,189.02	700,000.00
11/28/90	273,496.40	250,000.00
11/29/90	330,209.37	200,000.00
11/30/90	256,994.37	100,000.00
12/03/90	540,568.58	300,000.00
12/04/90	466,499.00	300,000.00
12/05/90	217,240.52	100,000.00
12/06/90	132,864.98	75,000.00
12/07/90	154,740.08	50,000.00
12/10/90	58,993.13	50,000.00
12/11/90	35,419.75	25,000.00
12/12/90	184,328.44	125,000.00
12/13/90	246,895.80	50,000.00
12/14/90	106,523.84	100,000.00
12/17/90	652,799.00	600,000.00
12/18/90	311,365.09	150,000.00
12/19/90	164,053.18	75,000.00
12/20/90	13,252.00	75,000.00
12/21/90	80,679.28	50,000.00
12/26/90	98,643.83	75,000.00
12/27/90	68,601.00	50,000.00
12/28/90	403,467.56	350,000.00
12/31/90	135,245.09	100,000.00

49 There presently exists at least one creditor who holds an unsecured claim against Sahuaro allowable under 11 U.S.C. § 502 (or is not allowable only under 11 U.S.C. § 502(e)). This creditor had a claim against Sahuaro at the time that Sahuaro made the **TRANSFERS** or incurred the **OBLIGATIONS** described herein.

FIRST CLAIM FOR RELIEF

Avoidance of Fraudulent Transfers

(Against Clark, NIC, and GIC)

50 Plaintiff realleges paragraphs 1 through 49 and incorporates said paragraphs herein by this reference.

51 Sahuaro made the **TRANSFERS** and incurred the **OBLIGATIONS** with the actual intent to hinder,

delay, or defraud an entity to which Sahuaro was or became indebted on or after the date of said **TRANSFERS** and **OBLIGATIONS**.

52 Pursuant to 11 U.S.C. §§ 544, 548 and Az.R.S. §§ 44-1001 et. seq., Plaintiff acting as trustee for said creditors and the bankruptcy estate, may avoid in its entirety those **TRANSFERS** and **OBLIGATIONS** which are voidable in whole or in part.

53 Plaintiff seeks to avoid the **TRANSFERS** and **OBLIGATIONS**.

SECOND CLAIM FOR RELIEF
Avoidance of Fraudulent Transfers
(Against Clark, NIC, and GIC)

54 Plaintiff realleges paragraphs 1 through 49 and incorporates said paragraphs herein by this reference.

55 Sahuaro received less than a reasonably equivalent value in exchange for the **TRANSFERS** and **OBLIGATIONS**.

56 On the date Sahuaro made the **TRANSFERS** or incurred the **OBLIGATIONS** Sahuaro was insolvent or became insolvent as a result of the **TRANSFERS** and **OBLIGATIONS**.

57 Pursuant to 11 U.S.C. §§ 544, 548 and Az.R.S. §§ 44-1001 et. seq., Plaintiff acting as trustee for said creditors and the bankruptcy estate, may avoid in its entirety those **TRANSFERS** and **OBLIGATIONS** which are voidable in whole or in part.

58 Plaintiff seeks to avoid the **TRANSFERS** and **OBLIGATIONS**.

THIRD CLAIM FOR RELIEF
Avoidance of Fraudulent Transfers
(Against Clark, NIC, and GIC)

59 Plaintiff realleges paragraphs 1 through 49 and incorporates said paragraphs herein by this reference.

60 Sahuaro received less than a reasonably equivalent value in exchange for the **TRANSFERS** and **OBLIGATIONS**.

61 The **TRANSFERS** and **OBLIGATIONS** from Sahuaro to **DEFENDANTS** occurred when Sahuaro was engaged in business, or was about to engage in business or a transaction, for which any property remaining with Sahuaro

after the **TRANSFERS** and **OBLIGATIONS** was an unreasonably small capital.

62 Pursuant to 11 U.S.C. §§ 544, 548 and Az.R.S. §§ 44-1001 et. seq., Plaintiff acting as trustee for said creditors and the bankruptcy estate, may avoid in its entirety those **TRANSFERS** and **OBLIGATIONS** which are voidable in whole or in part.

63 Plaintiff seeks to avoid the **TRANSFERS** and **OBLIGATIONS**.

FOURTH CLAIM FOR RELIEF
Avoidance of Fraudulent Transfers
(Against Clark, NIC, and GIC)

64 Plaintiff realleges paragraphs 1 through 49 and incorporates said paragraphs herein by this reference.

65 Sahuaro received less than a reasonably equivalent value in exchange for the **TRANSFERS** and **OBLIGATIONS**.

66 Sahuaro intended to incur, or believed that it would incur, debts that would be beyond its ability to pay as such debts matured.

67 Pursuant to 11 U.S.C. §§ 544, 548 and Az.R.S. §§ 44-1001 et. seq., Plaintiff acting as trustee for said creditors and the bankruptcy estate, may avoid in its entirety those **TRANSFERS** and **OBLIGATIONS** which are voidable in whole or in part.

68 Plaintiff seeks to avoid the **TRANSFERS** and **OBLIGATIONS**.

FIFTH CLAIM FOR RELIEF
Avoidance of Preferential Transfers
(Against Clark, NIC, and GIC)

69 Plaintiff realleges paragraphs 1 through 49 and incorporates said paragraphs herein by this reference.

70 Plaintiff is informed and believes and thereon alleges that the **TRANSFERS** and **OBLIGATIONS** were transfers of an interest in property of Sahuaro --

(1) to or for the benefit of Clark, GIC, and NIC as creditors of Sahuaro;

(2) for or on account of an antecedent debt Sahuaro owed before such transfers were made;

(3) that such transfers were made while Sahuaro was insolvent;

(4) that such transfers were made

(a) on or within 90 days before the date Sahuaro filed its chapter 11 petition or

(b) between 90 days and one year before the date Sahuaro filed its chapter 11 petition;

(5) that enabled Clark, GIC, and NIC to receive more than they would have received if --

(a) the case were a case under chapter 7 of title 11, United States Code;

(b) the transfers had not been made; and

(c) Clark, NIC, and GIC received payment of such debt to the extent provided by the provisions of title 11, United States Code.

(6) that the amount of the debt secured by such **OBLIGATIONS** exceeded the value of all security interests for such debt

(a) within 90 days before the date Sahuaro filed its chapter 11 petition or

(b) within one year before the date Sahuaro filed its chapter 11 petition.

SIXTH CLAIM FOR RELIEF
Recovery of Avoided Transfers
(Against Clark, NIC, and GIC)

71 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, and 70 and incorporates said paragraphs herein by this reference.

72 Plaintiff is informed and believes and thereon alleges that **DEFENDANTS** are the initial transferees of such **TRANSFERS** and **OBLIGATIONS**, or the entities for

whose benefit such **TRANSFERS** and **OBLIGATIONS** were made.

73 Plaintiff is informed and believes and thereon alleges that **DEFENDANTS** are the immediate or mediate transferees of such initial transferee.

74 Plaintiff is informed and believes and thereon alleges **DEFENDANTS** did not take said **TRANSFERS** and **OBLIGATIONS** or Transfers for value and had knowledge of the voidability of the **TRANSFERS** and **OBLIGATIONS** and Transfers.

75 Plaintiff is informed and believes and thereon alleges that at the time of the **TRANSFERS** and **OBLIGATIONS**, **DEFENDANTS** did not give fair consideration and had knowledge the **TRANSFERS** and **OBLIGATIONS** were fraudulent.

76 **DEFENDANTS** as transferees of said **TRANSFERS** and **OBLIGATIONS** were not, and are not, bona fide purchasers of the **TRANSFERS** and **OBLIGATIONS**.

77 By reason of the foregoing, the **TRANSFERS** and **OBLIGATIONS** are recoverable from **DEFENDANTS** pursuant to 11 U.S.C. § 550.

SEVENTH CLAIM FOR RELIEF
To Value, Avoid, and Invalidate Liens
(Against Clark, NIC, and GIC)

78 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, and 72 through 77 and incorporates said paragraphs herein by this reference.

79 The liens of **DEFENDANTS** which secure claims in property in which the estate of Sahuaro holds an interest are voidable as fraudulent transfers as alleged above.

80 Such claims of **DEFENDANTS** were not disallowed only under 11 U.S.C. §§ 502(b)(5) or 502(e).

81 Such claims of **DEFENDANTS** are not allowed secured claims due only to the failure of any entity to file a proof of such claim under 11 U.S.C. § 501.

82 The value of the property of the estate in which liens of **DEFENDANTS** secure claims is less than the

value of all liens and encumbrances which are senior to **DEFENDANTS**.

83 The liens of **DEFENDANTS** should be declared void and invalidated pursuant to 11 U.S.C. § 506.

EIGHTH CLAIM FOR RELIEF
To Determine Validity, Priority, or Extent of Liens
(Against Clark, NIC, and GIC)

84 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, and 79 through 83 and incorporates said paragraphs herein by this reference.

85 The **OBLIGATIONS** to **DEFENDANTS** securing the indebtedness of Edgington are liens against the proceeds of the sale of property of the estate. Said liens are avoidable by Haberbush as the hypothetical, judicial-lien creditor or execution-creditor pursuant to § 544(a)(1) and/or § 544(a)(2) of the Bankruptcy Code.

86 Pursuant to section 551 of the Bankruptcy Code, Plaintiff is entitled to preserve the avoided liens or portions of liens of **DEFENDANTS** for the benefit of the bankruptcy estate.

NINTH CLAIM FOR RELIEF
Equitable Subordination
(Against All Defendants)

87 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, 79 through 83, 85 through 86, and incorporates said paragraphs herein by this reference.

88 **DEFENDANTS** participated in the inequitable conduct alleged above arising from Sahuaro making the **TRANSFERS** and incurring **OBLIGATIONS**.

89 The conduct of **DEFENDANTS** damaged and injured creditors of Sahuaro.

90 Any and all claims of **DEFENDANTS** should be subordinated to all other claims of Sahuaro and any liens of **DEFENDANTS** should be transferred to the bankruptcy estate.

TENTH CLAIM FOR RELIEF

Objection to and Denial of Claims

(Against All Defendants)

91 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, 79 through 83, and 85 through 86 and incorporates said paragraphs herein by this reference.

92 The avoidance of the **TRANSFERS** and **OBLIGATIONS** alleged above eliminates any indebtedness from Sahuaro to **DEFENDANTS**.

93 Plaintiff objects to any and all claims of all Defendants. Any and all claims of all defendants against the bankruptcy estate of Sahuaro should be denied.

ELEVENTH CLAIM FOR RELIEF

Fraud and Duress

(Against Clark, GIC, and NIC)

94 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, 79 through 83, 85 through 86, and 88 through 90 and incorporates said paragraphs herein by this reference.

95 Plaintiff is informed and believes and thereon alleges that Sahuaro incurred the **OBLIGATIONS** and made the **TRANSFERS** alleged herein as a result of threats of Clark to withhold funds and supplies to Sahuaro and sweep the accounts of Sahuaro. Any consent of Sahuaro to incur the **OBLIGATIONS** and make the **TRANSFERS** was obtained solely through economic duress.

96 The apparent consent of Sahuaro to incur the **OBLIGATIONS** and make the **TRANSFERS** was involuntary and Sahuaro's apparent consent was obtained through duress and menace by directors of Edgington and Sahuaro who had a direct financial interest in the payments to Clark and Paribas.

97 The aforementioned acts were done with malice, oppression, and fraud and Plaintiff is entitled to punitive damages.

TWELFTH CLAIM FOR RELIEF

Undue Influence, Constructive Fraud

(Against Clark, Novelly, Altmansberger, and Goldstein)

98 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, 79 through 83, 85 through 86, 88 through 90, 92 through 93, and 95 through 97 and incorporates said paragraphs herein by this reference.

99 On or about September 29, 1989 Novelly, Altmansberger, and Goldstein became directors of Edgington. Plaintiff is informed and believes and thereon alleges that on or about September 29, 1989 Novelly, Altmansberger, and Goldstein became directors of Sahuaro and that Clark, NIC, GIC, Novelly, Altmansberger, and Goldstein effectively controlled Sahuaro.

100 At a time when Sahuaro was in need of capital to carry on operations, Clark, NIC, GIC, Novelly, Altmansberger, and Goldstein induced or caused Sahuaro to guaranty obligations of Edgington to Clark and obligations of Clark to Paribas.

101 Sahuaro executed the security agreements, guarantees, and other documents listed above on direct orders of Clark, NIC, GIC, Novelly, Altmansberger, and/or Goldstein because they controlled Sahuaro's board of directors.

102 Clark, NIC, GIC, Novelly, Altmansberger, and Goldstein induced Sahuaro to enter into the security agreements and guarantees for the purpose of enabling Clark to secure for Clark's own personal benefit certain profits and advantages and Clark did secure these advantages.

THIRTEENTH CLAIM FOR RELIEF

Alter Ego on Corporate Obligations

(Against Clark, Goldstein, Novelly, and Altmansberger)

103 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, 79 through 83, 85 through 86, 88 through 90, 92 through 93, 95 through 97, and 99 through 102 and incorporates said paragraphs herein by this reference.

104 Defendant Clark is, and at all times herein mentioned was, the owner of 50% of the outstanding voting shares of common stock of Edington. Edgington is the parent corporation, and owned 100% of the stock, of Sahuaro.

105 At all times herein mentioned, Altmansberger, Goldstein and Novelly were directors of Edgington and Sahuaro and were placed on the Edgington and Sahuaro boards by Clark and continued their allegiance to Clark in contravention of their fiduciary duties to Edgington and Sahuaro.

106 There exists and at all times herein mentioned there existed, a unity of interest and ownership between defendants Clark, Altmansberger, Goldstein, and Novelly, and Edgington and Sahuaro such that any individuality and separateness between defendants Clark, Altmansberger, Goldstein, and Novelly, and Edgington and Sahuaro have ceased, and Sahuaro is the alter ego of Clark, Altmansberger, Goldstein, and Novelly, in that they:

(1) placed Altmansberger, Goldstein, and Novelly, on Sahuaro's and Edgington's boards of directors;

(2) required that Sahuaro obtain approval from Clark before Sahuaro paid any of Sahuaro's creditors;

(3) used assets of Sahuaro for the personal uses of Clark, caused assets of Sahuaro to be transferred to Clark or to creditors of Clark without adequate consideration, and withdrew funds from Sahuaro's bank accounts for Clark's personal use;

(4) completely controlled, dominated, managed, and operated the corporate affairs of both Edgington and Sahuaro and intermingled the assets of each to suit their convenience by placing the assets of Sahuaro in the name of Edgington and/or transferring the assets of Sahuaro directly to Clark, or to Paribas for the benefit of Clark, in order to evade payment of the obligations Sahuaro owed to creditors and to satisfy the debts that Edgington owed Clark and that Clark owed Paribas; and

(5) caused Sahuaro to incur obligations and granted security interests in Sahuaro's assets to Clark and Paribas.

107 Adherence to the fiction of the separate existence of Sahuaro as an entity distinct from Clark and Edgington would permit abuse of the corporate privilege and would sanction a fraud in that Clark, Novelly, Goldstein, and Altmansberger caused the sum of $48 million to be withdrawn

from the funds of Sahuaro and distributed to Clark or to creditors of Clark without any consideration to Sahuaro, all for the purpose of preferring Clark over any other creditors of Sahuaro and avoiding and preventing attachment and execution by creditors, thereby rendering Sahuaro insolvent and unable to meet its obligations and pay any of its creditors.

108 In acting as hereinabove described, Altmansberger, Goldstein and Novelly did not exercise the care required of directors.

109 As a proximate result of the acts of Altmansberger, Goldstein and Novelly hereinabove described, Sahuaro has been damaged in the sum of $65 million.

110 The above-described acts were done with malice, fraud, and oppression and Plaintiff is entitled to exemplary damages against Defendants Novelly, Altmansberger, and Goldstein.

FOURTEENTH CLAIM FOR RELIEF
Damages Against Directors For Approving Improper Distribution to Shareholders
(Against Novelly, Altmansberger, and Goldstein)

111 Plaintiff realleges paragraphs 1 through 49, 51 through 53, 55 through 58, 60 through 63, 65 through 68, 70, 72 through 77, 79 through 83, 85 through 86, 88 through 90, 92 through 93, 95 through 97, 99 through 102, and 104 through 110 and incorporates said paragraphs herein by this reference.

112 Plaintiff is a hypothetical judgment lien creditor of Sahuaro. Sahuaro made distributions to which Plaintiff did not consent.

113 Plaintiff is informed and believes, and thereon alleges, that Altmansberger, Goldstein and Novelly approved a distribution of Sahuaro's cash and property to its shareholder Edgington by declaring a dividend, which amount in the aggregate of $48 million was actually transferred to Clark or to Paribas for the benefit of Clark.

114 Plaintiff is informed and believes and thereon alleges that the distribution alleged in paragraph 113 above was contrary to law in that Sahuaro was insolvent or rendered insolvent by the payment of the dividends and was not paid out of the unreserved and unrestricted earned surplus

of the corporation or out of the unreserved and unrestricted net earings of the then current fiscal year and the next preceding fiscal year taken as a single period.

115 Plaintiff is informed and believes and thereon alleges that the distribution alleged paragraph 113 above was contrary to law in that Sahuaro as a result of making the distributions will be and was unable to meet its liabilities as they mature.

116 No creditor of the corporation whose debt or claim arose prior to the time of the unlawful distribution herein alleged consented thereto except for Clark and Paribas. The liabilities of the corporation to such nonconsenting creditors at the time of the distribution were approximately $65 million.

117 As a result of the unlawful distribution alleged above, defendants Altmansberger, Goldstein and Novelly are jointly and severally liable to the corporation for the benefit of all creditors for the amount of such dividend or the value of such assets which were distributed in excess of the amount of such dividend or distribution which could have been paid.

WHEREFORE, Plaintiff prays that this court enter judgment as follows:

a. That the **TRANSFERS** and **OBLIGATIONS** to **DEFENDANTS** be declared null and void;

b. That the preferential transfers alleged above be declared avoided;

c. That **DEFENDANTS** be ordered to pay Plaintiff the property transferred or the value of such property arising from the **TRANSFERS** and **OBLIGATIONS**;

d. For a judgment declaring void, invalid, and of no force and effect, any liens of **DEFENDANTS** against the proceeds of the sale of the property of Sahuaro;

e. That the security interests and liens of **DEFENDANTS** be transferred to and preserved for the benefit of the bankruptcy estate;

f. That any and all claims of **DEFENDANTS** be subordinated to the claims of all other claims of Sahuaro;

g. That the objection to the claims of **DEFENDANTS** be sustained and the claims be declared null and void;

h. For damages in the sum of $65 million for any and all dividends and distributions from Sahuaro, to be awarded Plaintiff for the benefit of all nonconsenting creditors or shareholders.

i. For punitive damages in an amount to be fixed to punish Defendants;

j. Against Clark, Novelly, Altmansberger, and Goldstein as the alter ego of Sahuaro for the value of the **OBLIGATIONS** and any **TRANSFERS** to Clark or to Paribas for the benefit of Clark.

k. For reasonable attorneys' fees;

l. For costs of suit incurred herein; and

m. For such other and further relief as the court deems just and proper.

Dated: September 6, 1996 ROQUEMORE, PRINGLE & MOORE, INC.

By: _____/s/_____
Steven J. Lee, Attorneys for David R. Haberbush, Chapter 7 Trustee

No. 96-386

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DAVID R. HABERBUSH, Chapter 7 Trustee,
Petitioner,

vs.

CLARK OIL TRADING COMPANY; NIC, INC.; GIC, INC.; PAUL A. NOVELLY; LAWRENCE ALTMANSBERGER; and SAMUEL R. GOLDSTEIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

C. STEPHEN HOWARD
Counsel of Record
PAUL S. ARONZON
EILEEN DRISCOLL RUBENS
LAWRENCE B. GILL

MILBANK, TWEED, HADLEY & MCCLOY

601 South Figueroa Street
30th Floor
Los Angeles, California 90017
(213) 892-4000

NEIL H. MILLER

CLARK OIL TRADING COMPANY

8182 Maryland Avenue
St. Louis, Missouri 63105
(314) 854-8574

Attorneys for Respondents

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

QUESTIONS PRESENTED FOR REVIEW

Although Petitioner purports to pose a single question for review, the Petition in fact presents for review two separate questions of statutory construction under former 11 U.S.C. § 546(a)(1) as it existed before its amendment in 1994:

1. In those circuits that construe the two-year statute of limitations set forth in former 11 U.S.C. § 546(a)(1) to apply to a debtor in possession as well as to an appointed trustee, does a Chapter 7 trustee succeeding a debtor in possession receive the benefit of a new two-year limitations period or merely the remainder of the debtor in possession's two-year limitations period?

2. If a Chapter 7 trustee succeeding a debtor in possession receives the benefit of a new two-year limitations period for avoidance actions, does the new two-year limitations period commence when the Chapter 7 trustee is first appointed as interim trustee or when an initial meeting of creditors pursuant to 11 U.S.C. § 341(a) fails to result in the election of a different individual to serve as Chapter 7 trustee?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties listed on the caption of Respondents' Opposition Brief are parties to an adversary proceeding that was commenced by Petitioner as trustee of a Chapter 7 debtor, Sahuaro Petroleum & Asphalt Company, an Arizona corporation (the "Debtor").

When the Debtor filed for bankruptcy protection in 1991, it was a wholly-owned subsidiary of Edgington Oil Company. Respondents do not know whether the Debtor has any interest in any nonwholly-owned subsidiaries.

Respondents NIC, Inc. and GIC, Inc. are Missouri corporations that are themselves wholly owned by Apex Oil Company, Inc., also a Missouri corporation. NIC, Inc. and GIC, Inc. each holds a 50 percent interest in Respondent Clark Oil Trading Company, a Missouri partnership. Clark Oil Trading Company holds a 66.67 percent interest in New York Brownstone Associates, a New York partnership.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW. i

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATUTE INVOLVED 2

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED 2

SUMMARY OF ARGUMENT 5

REASONS WHY THE PETITION SHOULD BE DENIED 6

I. THE PETITION SHOULD BE DENIED AS TO THE FIRST QUESTION PRESENTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE ISSUE HAS BEEN RESOLVED BY THE 1994 AMENDMENTS TO THE BANKRUPTCY CODE 6

A. There exists no conflict among courts of appeals regarding the first question presented 6

Page

B. In light of the 1994 Amendments to the Bankruptcy Code, the first question presented does not raise an important issue of federal law. 8

II. THE PETITION SHOULD BE DENIED AS TO THE SECOND QUESTION PRESENTED BECAUSE THE NINTH CIRCUIT NEVER CONSIDERED THE QUESTION; THERE IS NO COURT OF APPEALS DECISION TO REVIEW 9

CONCLUSION. 9

TABLE OF AUTHORITIES

Page

Cases

Clark Oil and Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.), 170 B.R. 689 (C.D. Cal. 1994) 4

Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group Inc.), 13 F.3d 81 (3d Cir. 1994) 7

Gleishman Sumner Co. v. King, Weiser, Edelman & Bazar, 69 F.3d 799 (7th Cir. 1995) 7

Maurice Sporting Goods, Inc. v. Maxway Corp., 27 F.3d 980 (4th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 580, 130 L. Ed. 2d 495 (1994) 7

Mosier v. Kroger Co. (In re IRFM, Inc.), 65 F.3d 778 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1848, 134 L. Ed. 2d 949 (May, 1996). 5, 7, 9

U.S. Brass and Copper Co. v. Caplan (In re Century Brass Prods., Inc.), 22 F.3d 37 (2d Cir. 1994) 7

Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.), 994 F.2d 682 (9th Cir. 1993). 7

Zilkha Energy Co. v. Leighton, 920 F.2d 1520 (10th Cir. 1990) 7

Page

Statutes:

The Bankruptcy Reform Act of October 22, 1994, 108 Stat. 4106 . . . . . 2, 8, 10

11 U.S.C. § 301 8
11 U.S.C. § 341(a) 3, 9, 10
11 U.S.C. § 546(a) 2
11 U.S.C. § 546(a)(1). 4-10
11 U.S.C. § 702(b) 3
11 U.S.C. § 702(d) 3
11 U.S.C. § 1107(a) 6
11 U.S.C. § 1108 6
28 U.S.C. § 1292(b) 4

Rules

United States Supreme Court Rule 10(a) 5

No. 96-386

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

DAVID R. HABERBUSH,
Chapter 7 Trustee,
Petitioner,

vs.

CLARK OIL TRADING COMPANY; NIC, INC.;
GIC, INC.; PAUL A. NOVELLY;
LAWRENCE ALTMANSBERGER; and
SAMUEL R. GOLDSTEIN
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum opinion of the court of appeals affirming the decision of the district court (Pet. App. at 24-26) is unreported, but may be found at 1996 U.S. App. LEXIS 11047 (9th Cir. 1996). The district court's order reversing the bankruptcy court's denial of Respondents' Motion to Dismiss is reported at 170 B.R. 689. The bankruptcy court, in denying Respondents' original Motion to Dismiss, issued no opinion. (Pet. App. at 38-39.)

STATUTE INVOLVED

This case involves 11 U.S.C. § 546(a) prior to its amendment in 1994, which prior statute stated, in relevant part:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title . . . .

11 U.S.C. § 546(a) (1993).[1]

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

On March 21, 1991, the Debtor filed a petition for relief under chapter 11 ("Chapter 11") of title 11 of the

---

[1] The Bankruptcy Reform Act of 1994, 108 Stat. 4106, effective October 22, 1994, amended 11 U.S.C. § 546(a) so that it now provides, in relevant part:

> (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A) . . . .

United States Code (the "Bankruptcy Code").[2] (Pet. App. at 29.) The bankruptcy court appointed no Chapter 11 trustee, and the debtor in possession thus conducted the business of the Debtor. (Pet. at 3.)

On September 5, 1991, the Debtor's Chapter 11 case was converted to one under chapter 7 ("Chapter 7") of the Bankruptcy Code.

On September 9, 1991, Petitioner was appointed the interim Chapter 7 trustee. (Pet. App. at 29 n.1.)

On November 6, 1991, the United States Trustee conducted a meeting of creditors pursuant to Bankruptcy Code § 341(a) (the "§ 341(a) Meeting"). At the § 341(a) Meeting, the Debtor's creditors did not request an election for a new Chapter 7 trustee and none was held; accordingly, Petitioner continued to serve as Chapter 7 trustee.[3] (Pet. App. at 41.)

On November 4, 1993, — more than two years after the Chapter 11 petition was filed and more than two years after Petitioner was first appointed Chapter 7 trustee — Petitioner commenced an adversary action against Respondents in the United States Bankruptcy Court for the Central District of California alleging fourteen claims for relief. (Pet. App. at 40.)

On January 7, 1994, Respondents filed a Motion to Dismiss based, *inter alia*, on the grounds that nine out of Petitioner's fourteen claims for relief were time-barred

---

[2] Unless otherwise indicated, all "section" references herein are to the Bankruptcy Code.

[3] The Bankruptcy Code provides that creditors of a debtor may choose to elect a Chapter 7 trustee at the § 341(a) Meeting. 11 U.S.C. § 702(b) (1996). If the creditors do not so choose, the interim Chapter 7 trustee is deemed trustee. 11 U.S.C. § 702(d) (1996).

by the two-year limitations period in former section 546(a)(1). (Pet. App. at 29.)

On February 9, 1994, the bankruptcy court denied Respondent's Motion to Dismiss. The bankruptcy court issued no opinion, and the order denying Respondents' Motion to Dismiss was filed on February 22, 1994. (Pet. App. at 38.)

On June 13, 1994, the district court reversed the bankruptcy court, finding that seven of the nine claims were time-barred by former section 546(a)(1). *Clark Oil and Trading Co. v. Haberbush (In re Sahuaro Petroleum & Asphalt Co.)*, 170 B.R. 689 (C.D. Cal. 1994).[4] In so ruling, the district court held for Respondents on two separate grounds: (1) that the two-year statute of limitations for avoidance actions commenced upon the filing of the Chapter 11 petition and the entry of an order for relief in the case and did not restart with Petitioner's appointment as Chapter 7 trustee, *id.* at 691-92; and (2) that, even assuming that the limitations period restarted upon Petitioner's appointment, the new two-year limitations period commenced on the date of Petitioner's appointment as interim Chapter 7 trustee, not on the date that the Debtor's creditors failed to elect another individual to replace him. *Id.* at 693.

On August 1, 1994, the district court certified its ruling for interlocutory appeal under 28 U.S.C. § 1292(b), and on September 26, 1994, the court of appeals granted Petitioner leave to appeal interlocutorily.

In a memorandum opinion dated April 29, 1996, the United States Court of Appeals for the Ninth Circuit affirmed the district court's order by stating that the

---

[4] The district court remanded to the bankruptcy court for further consideration the question of whether the two remaining claims were also time-barred. *Id.* at 694 n.4.

issue of whether the district court erred by concluding that the limitations period of section 546(a)(1) commenced on the date on which the Debtor filed its Chapter 11 petition and did not restart when Petitioner was appointed as Chapter 7 trustee had been "foreclosed by Ninth Circuit case law." (Pet. App. at 25.) In particular, the Ninth Circuit's decision in *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1848, 134 L. Ed. 2d 949 (May, 1996) ("*Kroger*"), was on all fours with this case and was controlling. The Ninth Circuit's memorandum opinion contained no discussion of the district court's alternative holding which, as stated above, was based on the conclusion that even if Petitioner received the benefit of a fresh two-year limitations period, the new two-year limitations period commenced as of Petitioner's appointment as interim Chapter 7 trustee, not when the Debtor's creditors failed to elect a different individual to serve as Chapter 7 trustee.

On June 10, 1996, the United States Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing and rejected Petitioner's suggestion for rehearing en banc. (Pet. App. at 27.)

SUMMARY OF ARGUMENT

The questions presented by the Petition are not subject to conflicting rulings by United States courts of appeals, and, as a result of the 1994 Amendments to the Bankruptcy Code, they do not present any important issue of federal law requiring the Court's consideration. In sum, there exist no compelling reasons under Supreme Court Rule 10(a) for the Court to grant certiorari in this case. The Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE PETITION SHOULD BE DENIED AS TO THE FIRST QUESTION PRESENTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AND THE ISSUE HAS BEEN RESOLVED BY THE 1994 AMENDMENTS TO THE BANKRUPTCY CODE.

A. There exists no conflict among courts of appeals regarding the first question presented.

Before its amendment in 1994, Bankruptcy Code § 546(a)(1) prescribed a two-year limitations period for avoidance actions filed by a trustee; the statute, however, was silent as to whether this two-year limitations period applied to avoidance actions filed by debtors in possession.[5] In the absence of a clear statutory rule, circuits arrived at conflicting answers concerning the applicability of former section 546(a)(1) to debtors in possession. The Ninth Circuit joined the Second, Third and Tenth Circuits in holding that the two-year limitations period of section 546(a)(1) applied to debtors in

---

[5] The Bankruptcy Code provides that in cases where the court does not deem it necessary or appropriate to appoint a trustee to oversee the debtor's operations, the debtor itself, as debtor in possession, may undertake the responsibilities of a trustee. *See* 11 U.S.C. §§ 1107(a), 1108 (1996).

possession.[6] The Fourth and Seventh Circuits held to the contrary.[7]

However, in its section entitled "Questions *Not* Presented For Review," the Petition expressly reads: "this Court is *not* asked to determine whether the limitation period in § 546 applies to debtors in possession." (Pet. at ii (emphasis in original).) Instead, Petitioner asks the Court to consider whether, in those circuits that construe the two-year statute of limitations in former section 546(a)(1) to apply to debtors in possession as well as to appointed trustees, that statute confers upon a Chapter 7 trustee succeeding a debtor in possession an additional two years following conversion of the case to Chapter 7 to bring an avoidance action. The Ninth Circuit squarely answered this question in the negative in the *Kroger* decision, and this Court denied a petition for certiorari. *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778, 780-81 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 1848, 134 L. Ed. 2d 949 (May, 1996). In this case, the Ninth Circuit merely followed its ruling in *Kroger*.

---

[6] *See, e.g., Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993) (holding pre-amendment section 546 applies to debtors in possession); *U.S. Brass and Copper Co. v. Caplan (In re Century Brass Prods., Inc.)*, 22 F.3d 37 (2d Cir. 1994) (same); *Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group Inc.)*, 13 F.3d 81 (3d Cir. 1994) (same); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523-24 (10th Cir. 1990) (same).

[7] *See, e.g., Maurice Sporting Goods, Inc. v. Maxway Corp.*, 27 F.3d 980 (4th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 580, 130 L. Ed. 2d 495 (1994) (holding pre-amendment section 546 does not apply to debtors in possession); *Gleishman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995) (same).

Petitioner has failed to cite any conflicting decision by a court of appeals on the first question presented; rather, what Petitioner cites is a series of cases bearing upon precisely the issue "not presented" by the Petition, to wit, whether former section 546(a)(1) should apply to avoidance actions filed by debtors in possession. (*See* Pet. App. 7-18.) In sum, no court of appeals has held contrary to the Ninth Circuit's *Kroger* decision on the issue actually presented by the Petition and, as such, the Court is not faced with any conflict among the circuit courts.

B. In light of the 1994 Amendments to the Bankruptcy Code, the first question presented does not raise an important issue of federal law.

On October 22, 1994, Congress enacted the Bankruptcy Reform Act of 1994 (the "1994 Amendments"), which amended, among other things, section 546(a)(1) to provide that both a trustee and a debtor in possession shall have two years from the filing of the bankruptcy petition to bring an avoidance action, with the proviso that if a first trustee is appointed before the expiration of the second year following entry of the order for relief,[8] such trustee will have one year from appointment to bring an avoidance action. *See* 11 U.S.C. § 546(a)(1) (1996).

As a result of the 1994 Amendments, there is no compelling reason for the Court to review this question because it is relevant only to bankruptcy cases filed before October 22, 1994. While former section 546(a)(1)

---

[8] The filing of a bankruptcy petition constitutes entry of the order for relief. 11 U.S.C. § 301 (1996).

continues to apply to cases filed before that date, the number of such cases is diminishing. As to those cases arising after the 1994 Amendments, Congress has set forth clear guidelines. Accordingly, far from presenting an important federal question, the Petition raises issues the resolution of which would have de minimis impact. In light of the fact that the number of cases potentially affected by the issues presented in the Petition is finite and dwindling, the Court should not, under the circumstances, expend its limited time and resources considering them.

II.

THE PETITION SHOULD BE DENIED AS TO THE SECOND QUESTION PRESENTED BECAUSE THE NINTH CIRCUIT NEVER CONSIDERED THE QUESTION; THERE IS NO COURT OF APPEALS DECISION TO REVIEW.

As described above, the Ninth Circuit did not reach the district court's alternative holding that Petitioner's appointment as interim Chapter 7 trustee (as opposed to the § 341(a) Meeting) commenced any separate two-year limitations period available to Petitioner under former section 546(a)(1). Nor has any other court of appeals ever addressed it. Therefore, with regard to the second question, the Court is presented with no court of appeals decision to review. The Court should deny certiorari.

CONCLUSION

In this case, the Ninth Circuit followed its holding in *Kroger* that the two-year statute of limitations for

avoidance actions set forth in former Bankruptcy Code § 546(a)(1) does not start anew where a Chapter 7 trustee replaces a debtor in possession upon conversion of the case from Chapter 11 to Chapter 7. No other circuit recognizing the application of former section 546(a)(1) to debtors in possession has ever held to the contrary. There is no conflict among the circuits on this issue. Further, as a result of the enactment of the Bankruptcy Reform Act of 1994, this is not an important federal question necessitating review. Finally, with regard to the question of whether a limitations period affecting a trustee commences as of the appointment of an interim trustee or as of the § 341(a) Meeting, neither the Ninth Circuit nor any other court of appeals has considered or ruled on this question. There is no court of appeals decision to review.

WHEREFORE, for all the foregoing reasons, Respondents request that the petition for writ of certiorari be denied.

DATED: October 15, 1996.

Respectfully submitted,

C. STEPHEN HOWARD
Counsel of Record

PAUL S. ARONZON
EILEEN DRISCOLL RUBENS
LAWRENCE B. GILL
MILBANK, TWEED,
HADLEY & McCLOY

NEIL H. MILLER
CLARK OIL TRADING COMPANY

Attorneys for Respondents